IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Reissue Application of:	)	
BORDEN M. LARSON, ET AL.	)	Examiner: S. Avila
Reissue of: U.S. Patent No. 5,979,350	)	Group Art Unit: 3617
Reissue Appln. No.: 09/613,154	)	Current Status: Pending
Filed: June 30, 2000	)	
For: WATER SPORT TOWING APPARATUS AND METHOD	)	

Box REISSUE
Commissioner for Patents
Washington, D.C. 20231

PROTEST UNDER 37 C.F.R. § 1.291 TO PATENTEE'S APPLICATION FOR REISSUE OF U.S. PATENT NO. 5,979,350

Sir:

Pursuant to 37 C.F.R. § 1.291, the undersigned submits this PROTEST UNDER 37 C.F.R. § 1.291 TO PATENTEE'S APPLICATION FOR REISSUE OF U.S. PATENT NO. 5,979,350, to protest the allowance of Reissue Application No. 09/613,154, filed on behalf of Applicants and their assignee, Correct Craft, Inc., on June 30, 2000. Notice of the filing of the subject reissue application was published in the *Official Gazette* on August 29, 2000. A copy of this Protest has been served on Applicants' patent agent.

I. OPENING REMARKS

The subject application seeks reissuance of U.S. Patent No. 5,979,350 ("the '350 patent"), which issued November 9, 1999, based on an application filed March 9, 1998. The '350 patent relates to an apparatus for and a method of towing a performer using a water sports

implement, such as a wakeboard or the like. The claims are directed to a vessel having a towing structure mounted thereon, amidships, with a tow rope attached to an upper portion of the towing structure at a height substantially above the operator station of the vessel. Some of the claims further specify that the towing structure may pivot downward so that the vessel can pass underneath a bridge or into a boat house. The invention of the '350 patent is touted as an improvement over prior art extendible pylons, which were said to "flex too much when the performer cuts away or to the wake," causing the boat to heel to a point of instability. Col. 1, lines 30-35. According to the '350 patent, securing a towing structure to four mounting locations along the sides of the vessel provides "a generally more rigid unit" than prior art pylons. Col. 4, lines 65-67.

As a basis for reissue, Applicants seek to claim the benefit of the filing date of an earlier-filed design application, which eventually issued as U.S. Patent No. Des. 409,972 ("the '972 design patent"). Protestor will demonstrate, however, that none of the pending reissue claims is supported by the application for the '972 design patent, and, therefore, those claims are *not* entitled to the benefit of the earlier filing date.

In addition, Protestor will demonstrate that the pending claims are unpatentable over prior art that was not of record during the original prosecution of the application for the '350 patent. Specifically, two prior art printed publications — an article from a September 1995 issue of *Powerboat* magazine and a 1996 video entitled "HIT IT!" — each disclose a water sports performer being towed from a boat tower that is mounted amidships and substantially above the operator station of the boat. Additionally, Protestor will demonstrate that, on at least two separate occasions prior to the critical date, in full public view on lakes in Florida, a tower, mounted amidships above the operator station of a boat, was used to tow a wakeboard performer.

These prior art references and events clearly anticipate at least claims 12, 15-19, 22, 24-30, 33, 35, 36, 38, and 39. As for the rest of the claims, the only limitations arguably not present all have to do with the pivotal attachment of the tower to the boat. Protestor will show, however, that at the time of Applicants' invention, it was well known in the art to pivotally attach any of a wide variety of structures — including towers — atop a boat using pivotal mountings like those shown and described in the '350 patent, so that the boat could pass under low clearances. Once the benefits of mounting a tower amidships for the purpose of towing a water sports performer were recognized, all other details (*e.g.*, mounting the tower to the gunwales or the floor, making the tower pivotable, etc.) were options that would have been obvious to an ordinarily-skilled marine tower designer. Such incidental details, therefore, do not constitute patentable advancements over the prior art.

II. THE PRIOR ART

A. The *Powerboat* Article

A September 1995 issue of *Powerboat* magazine contains an article, beginning at page 4 and continuing over to page 92, describing and illustrating the use of a tower-equipped photo boat to tow a trick skier sitting on an "Air Chair." That article, including an enlargement of one of the photographs therein, is appended hereto as Exhibit 1.

As can be seen from the photograph in the article, the tower is mounted on the boat amidships, and a tow rope is secured to a horizontal bridging portion of the tower, at a height substantially above the operator station. The tower appears to be attached to the gunwales of the boat. Of particular interest, the article notes:

> Trick skier extraordinaire Mike Murphy needed *Powerboat* magazine to pull off his latest stunt, one in which the high-flyer soared higher than ever before.

> Actually, he didn't need us. He needed our photo boat. By tying his tow rope to the top railing of the photo tower on our Nordic 23-footer, *Powerboat Magazine*, Murphy got the lift he needed to soar more than 13' into the air on one of his popular Air Chairs, breaking the previous record by a few feet.

B. The "HIT IT!" Video

Concurrently with their reissue application, Applicants filed an Information Disclosure Statement, citing, among other things, a 1996 video entitled "HIT IT!".[1] The video is about 45 minutes long, and the most relevant footage can be found approximately 32 minutes, 12 seconds, and 33 minutes, 50 seconds, into the video. Protestor's attached Exhibit 2 consists of several still images from this footage.

The first video clip, which lasts approximately five seconds, shows a wakeboarder being towed from behind a boat tower that is mounted amidships. A tow rope is secured to a fitting, which in turn is mounted to a horizontal bridging portion of the tower at a height substantially above the operator station of the boat.

The second video clip, also approximately five seconds long, shows another view of the boat and tower and better illustrates how the tow rope is secured to the tower. Meanwhile, a wakeboarder points to the tow rope connection at the top of the tower and explains that "height plus speed equals distance and — no, rope, rope height [fade to music]."

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[1] A video tape should be treated no differently than any other prior art printed publication, provided it was reasonably available to persons concerned with the relevant art. *See In re Wyer*, 655 F.2d 221, 227, 210 U.S.P.Q. 790, 795 (C.C.P.A. 1981) ("[W]hether information is printed, handwritten, or on microfilm or a magnetic disc or tape, etc., the one who wishes to characterize the information, in whatever form it may be, as a 'printed publication' should produce sufficient proof of its dissemination or that it has otherwise been available and accessible to persons concerned with the art to which the document relates and thus most likely to avail themselves of its contents."); *see also* MPEP 2128.

In their reissue application, Applicants state that they are not aware of the publication date of the "HIT IT!" video, but concede that it has a 1996 copyright date. Protestor's attached Exhibit 3 is a Declaration of Arthur Krehbiel, one of the producers of the "HIT IT!" video, stating that his company, FLF Films, first shipped the "HIT IT!" video to customers no later than February 1, 1997, in plenty of time for customers to have received it before March 9, 1997. Protestor's attached Exhibit 4 is an advertisement for the "HIT IT!" video that appeared in a August 1996 issue of *Wake Boarding Magazine*, at page 42. The advertisement indicates that, at least as early as August 1996, the video could have been purchased from FLF Films for $24.95, plus shipping and handling. The advertisement further includes a telephone number and order form for ordering the video. This is proof, Protestor submits, that the "HIT IT!" video was published at least as early March 8, 1997.

C. Prior Public Use

Protestor's attached Exhibit 5 is a Declaration of Tom King, a professional photographer from Orlando, Florida, who has been photographing water sports events since 1977. In his Declaration, Mr. King recounts two separate occasions, one in 1991 and another in 1992, on which he towed Dave Reinhart, a well-known water sports performer, from a photo tower mounted amidships above the operator station of his boat. The boat and tower with which Mr. King towed Mr. Reinhart are depicted in a photograph attached to the King Declaration. As can be seen from that photograph, the tower is mounted to the gunwales of the boat at a position amidships, and a tow rope is attached to the tower at a point above the operator station of the boat, approximately six feet above the floor of the boat.

The first instance described in the King Declaration took place in the fall of 1991 at a photo shoot for a boat test by *WaterSki* magazine, held at the facilities of the Orange County

Sportsmen's Association on Lake Sheen in Orlando, Florida. During a lunch break, Mr. Reinhart asked Mr. King to attach a tow line to the tower of his boat, thinking it might give him the upward pull he needed to execute a difficult wakeboard maneuver known as the "Air Raley." Mr. King gladly complied, and several employees of *WaterSki* magazine and other performers accompanied Mr. King while he towed Mr. Reinhart from behind his boat. Approximately 20 other people watched all of this from the dock. Mr. King states that this lunch-time practice session was repeated for several days, until Mr. Reinhart had mastered the "Air Raley" maneuver. Because the foregoing events took place in public view on a public lake, persons unknown to Mr. King also may have witnessed these events. None of the persons who witnessed these events was under any obligation to keep what he or she had seen secret.

The second instance described in the King Declaration occurred during a photo shoot for a Connelly Skis' catalog in the fall of 1992. This time, the photo shoot took place in public view on Lake Tibet-Butler, another public lake in the Orlando area. At least four people were present during the shoot, and, once again, none of them was under any obligation to keep what he or she saw secret.

Protestor's attached Exhibit 6 is a letter from Mr. Reinhart, corroborating Mr. King's recollections.

On facts analogous to those set forth in the King Declaration, the Federal Circuit has found an invalidating prior public use under 35 U.S.C. § 102(b). *See, e.g., Beachcombers, Int'l v. Wildewood Creative Prods.*, 31 F.3d 1154, 1159-60, 31 U.S.P.Q.2d 1653, 1657 (Fed. Cir. 1994) (finding that the demonstration of a patented kaleidoscope "to some of the guests" at a party attended by 20-30 people amounted to an invalidating prior public use, where the guests were under no obligation to keep what they saw secret).

D. The 1987 Marine Catalog

Protestor's attached Exhibit 7 consists of several pages from a 1987 Marine Catalog of a company named Taco Supply. Of particular interest, pages 34 and 35 illustrate and describe several "CUSTOM MARINE TOWER FITTINGS," said to be "Used in the Construction of Towers, Tee Tops. Rocket Launchers, Bow Rails, Hard Top Supports, and Other Marine Structures." The catalog further notes, "All Pins Designed to Hinge 180° +," presumably a reference to the fact that structures mounted using these fittings are able to be rotated to a horizontal position.

E. Other Prior Art References

Other prior art references further demonstrate that it was well known in the art, prior to Applicants' invention, to make pivotable a vertically-extending structure that is mounted atop a boat, so that the structure can rotate downward to allow the boat to pass underneath a bridge or into a boat house, or the like. These other references also disclose details pertinent to the structure of Applicants' claimed vessel and tower, as well as the means for pivotally attaching the tower to the vessel. The following references are illustrative:

U.S. Patent No. 4,453,482 to Barker (Protestor's Exhibit 8), having an issuance date of June 12, 1984, discloses a mast that is pivotally attached to the deck of a yacht, thereby enabling the mast to be raised and lowered as needed. By way of example, the Barker patent notes that "[i]n travelling along the coast or inland waterways a ship or boat must frequently pass under bridges, elevated road ways, and the like," and that at "[o]ther times it may be necessary to bring the ship or boat into a boat house or dockside shed having limited headroom." Col. 1, lines 8-18.

U.S. Patent No. 5,417,178 to Harrelson, II (Protestor's Exhibit 9), having an issuance date of May 23, 1995, discloses a controller for pivoting a marine antenna from a normally vertical orientation to a substantially horizontal orientation, as is required for a boat "to pass freely under a bridge, into a boathouse, or the like." Abstract & col. 3, lines 11-15.

U.S. Patent No. 3,724,595 to Green (Protestor's Exhibit 10), having an issuance date of April 3, 1973, discloses an aluminum tuna tower comprising forward and aft U-shaped support structures, with a plurality of longitudinally-extending bars fitted therebetween, much like the tower shown and described in the '350 patent. The tuna tower is mounted to opposing gunwales of a boat.

U.S. Patent No. 5,697,320 to Murray (Protestor's Exhibit 11), having an issuance date of December 16, 1997, and a filing date of March 19, 1996, discloses a convertible canopy top that is pivotally attached to the hull of a watercraft "by a simple linkage system consisting of three U-shaped links." Abstract. Figure 4 of the Murray patent illustrates a pivotal mounting mechanism, which, like that shown in Figures 7 and 8 of the '350 patent, comprises "two well known commercially available camel back hinges 40 that are secured to each of the raised gunnels 20 and are located intermediate the stern and the bow opposite each other." Col. 3, lines 47-51.

Protestor's attached Exhibit 12 consists of several pages from the September 1995 issue of *Powerboat* magazine. Each page includes a photograph of a typical prior art ski boat having many of the same standard features as are recited with respect to Applicants' claimed vessel — namely, a bow, a foredeck aft of the bow, a stern, opposing sides, an operator station, and a wrap-around windshield.

III. PROTEST ARGUMENTS

A. Applicants' Proposed Amendment To The Reissue Application Is Improper

Applicants seek to amend the subject application by adding the following language to the specification:

> This Application is a Continuation-in-Part of and incorporates by reference Application Serial Number 29/078,494, filed October 27, 1997 and issuing as United States Patent No. Des. 409,972 on May 18, 1999, all of which are commonly owned and assigned.

For reasons explained below, this amendment is improper, and, therefore, should be denied entry.

1. The Reissue Application Cannot Be A Continuation-In-Part Of The Application For The '972 Design Patent Because None Of The Claims In The Reissue Application Is Fully Supported By The Disclosure Of The Application For The '972 Design Patent

For a utility application to be considered a continuation-in-part of an earlier-filed design application, "the disclosure of the design application must meet the requirements of the first paragraph of section 112 as applied to one or more claims of the continuation-in-part utility application." *KangaROOS U.S.A., Inc. v. Caldor, Inc.*, 778 F.2d 1571, 1574, 228 U.S.P.Q. 32, 33-34 (Fed. Cir. 1985). If none of the claims of the alleged continuation-in-part application is fully supported by the disclosure of the earlier-filed application, then the later application is not in fact a continuation-in-part, and none of its claims is entitled to the benefit of the filing date of the earlier application. *See In re Berkman*, 642 F.2d 427, 430, 209 U.S.P.Q. 45, 47 (C.C.P.A. 1981). Rather, those claims are entitled only to the filing date of the later application. *See* MPEP 208.11 ("[I]f a claim in a continuation-in-part application recites a feature which was not disclosed or adequately supported by a proper disclosure under 35 U.S.C. § 112 in the parent nonprovisional application, but which was first introduced or adequately supported in the

continuation-in-part application such a claim is entitled only to the filing date of the continuation-in-part application.").

In this case, the application for the '972 design patent illustrates what simply is referred to as a "boat tower." At most, one could infer that the tower is intended to be mounted on a boat. Beyond that, there is no suggestion concerning where on the boat the tower should be mounted, or even what purpose the tower serves. In contrast, each of the independent reissue claims (1, 12, 22, 33, 38, 39, and 41) recites one or more of the following features, none of which is disclosed, expressly or inherently, in the application for the '972 design patent:

- The tower is mounted amidships.
- A tow rope is attached to an upper portion of the tower, at a height substantially above the operator station.
- The boat is used to tow a performer using a water sport implement.

Because each of the independent claims recites features that are not at all disclosed in the application for the '972 design patent, none of the reissue claims is supported by, or entitled to the benefit of the filing date of, the application for the '972 design patent. The reissue application, therefore, is not a continuation-in-part of the design application, and all of the reissue claims are entitled only to the filing date of the application for the '350 patent — namely, March 9, 1998. The critical date then, for purposes of 35 U.S.C. § 102(b), is March 9, 1997. Accordingly, all of the prior art cited herein qualifies as § 102(b) art, with the exception of the Murray patent, which qualifies as § 102(e) art.

2. Applicants' Proposed Amendment To Incorporate By Reference The Application For The '972 Design Patent Should Not Be Entered Because It Would Introduce New Matter Into The Reissue Application, In Violation Of 35 U.S.C. § 251

Section 251 of Title 35 of the United States Code mandates that "[n]o new matter shall be introduced into the application for reissue." New matter is defined simply as "matter not present in the patent sought to be reissued." MPEP 1411.02.

Here, Applicants have attempted to incorporate by reference the application for the '972 design patent, including the seven figures contained therein. Those seven figures are not present in the '350 patent, and, therefore, unquestionably constitute new matter. Accordingly, Applicants' proposed amendment to incorporate by reference the application for the '972 design patent should be denied entry.

B. The Prior Art Anticipates Or Renders Obvious Every Claim Of The Reissue Application

For reasons explained below and further detailed in a claim chart attached hereto as Appendix A, each of the reissue claims is either anticipated by or obvious in view of the prior art.

1. Each Of Claims 12, 15-19, 22, 24-30, 33, 35, 36, 38, And 39 Is Anticipated Under 35 U.S.C. § 102(b) By The *Powerboat* Article, The "HIT IT!" Video, And/Or The Events Described In The King Declaration

A claimed invention is said to be anticipated under 35 U.S.C. § 102(b) if it "was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States." Anticipation requires that "each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." MPEP 2131

(quoting *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 U.S.P.Q.2d 1051, 1053 (Fed. Cir. 1987)).

In this case there are two prior art printed publications — the *Powerboat* article and the "HIT IT!" video — and two instances of prior public use that disclose every element of reissue claims 12, 15-19, 22, 24-30, 33, 35, 36, 38, and 39. Each of those claims, therefore, should be rejected under § 102(b) as being anticipated by the *Powerboat* article, the "HIT IT!" video, and/or the events described in the King Declaration. A detailed comparison of those claims to each prior art reference is set forth in Appendix A.

Recently, the patentee has expressed to Protestor its belief that the *Powerboat* article does not contain an enabling disclosure. True, "[i]t is well settled that prior art under 35 U.S.C. § 102(b) must sufficiently describe the claimed invention to have placed the public in possession of it. Such possession is effected if one of ordinary skill in the art could have combined the publication's description of the invention with his own knowledge to make the claimed invention." *In re Donohue*, 766 F.2d 531, 533, 226 U.S.P.Q. 619, 621 (Fed. Cir. 1985) (citations omitted); *see also* MPEP 2121.01. Prior art references, however, are presumed to be enabling; the party challenging the sufficiency of a reference's disclosure bears the burden of proving facts to rebut that presumption. *See* MPEP 2121.

Lest there be any doubt in this case about whether the *Powerboat* article contains an enabling disclosure, Protestor's attached Exhibit 13 is a Declaration of Ron Schmitt, President of G.G. Schmitt & Sons Inc., a manufacturer of marine hardware for pleasure boats, including ski boats. Since 1951, G.G. Schmitt & Sons Inc. has manufactured and sold thousands of boat-mounted aluminum structures, including photo towers, observation towers, arches, and T-tops. Mr. Schmitt has been designing marine hardware for G.G. Schmitt & Sons Inc. since 1971, and

he is knowledgeable about the level of ordinary skill in that industry for the years 1995 through 1998. Concerning the teachings of the *Powerboat* article, Mr. Schmitt states:

> In my opinion, during the time period from September 1995 to March 1998, an ordinarily-skilled marine hardware designer could have built a tower for towing a water sports performer and mounted such tower amidships on a boat, as recited in claims 12, 15, 16, 18, 19, 22, 24-27, 29, 30, 33, 35, 36, 38, and 39 of the '350 patent, based solely on the disclosure of the *Powerboat* article in combination with his or her own knowledge and skill, and without reference to the teachings of the '350 patent. Given the clear teaching of the *Powerboat* article to mount a tower amidships for the purpose of towing a water sports performer, the design, manufacture, and installation of such a tower would have been routine mechanical tasks, easily within the level of ordinary skill in the marine hardware industry during that time period.

Schmitt Declaration, ¶ 9.

2. The Rest Of The Claims Are Unpatentable Under 35 U.S.C. § 103(a) Over Any One Of The *Powerboat* Article, The "HIT IT!" Video, And The Public Use Events Described In The King Declaration, In View Of The Other Prior Art Submitted With This Protest

Although not identically described in a single reference, a claimed invention may nevertheless be unpatentable under 35 U.S.C. § 103(a) if "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art." Underlying the obviousness determination are the factual inquiries enunciated by the Supreme Court in *Graham v. John Deere Co.*, 383 U.S. 1, 148 U.S.P.Q. 459 (1966). These include (1) the scope and content of the prior art, (2) the level of ordinary skill in the pertinent art, and (3) the differences between the claimed invention and the prior art. *See* 383 U.S. at 17, 148 U.S.P.Q. at 467; *see also* MPEP 2141. Secondary considerations, including any objective evidence of non-obviousness such as commercial success, long-felt need, failure of others, etc.,

may also shed light on the obviousness determination. *See Graham*, 383 U.S. at 17-18, 148 U.S.P.Q. at 467. However, secondary considerations cannot overcome a strong case of obviousness based on the clear teachings of the prior art. *See Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 769, 9 U.S.P.Q.2d 1417, 1426 (Fed. Cir. 1988) (holding that because the record established such a strong case of obviousness based on the teachings of the prior art, the fact that the product was commercially successful does not overcome the conclusion of obviousness).

Where a finding of obviousness is based on a combination of references, there must exist some motivation for combining the references in the manner proposed. That motivation can come from the knowledge of those skilled in the art, from the references themselves, or from the nature of the problem to be solved. *See* MPEP 2143.01.

In this case, the relevant prior art includes at least (1) the *Powerboat* article,[2] (2) the "HIT IT!" video, (3) the public use events described in the King Declaration, (4) the 1987 Marine Catalog, (5) the Barker patent, (6) the Harrelson, II patent, (7) the Green patent, (8) the Murray patent, and (9) prior art ski boats such as shown in the September 1995 issue of *Powerboat* magazine. Of this art, the first three references are directed to the use of tower-equipped boats to tow water sports performers. The remaining art relates more generally to either ski boats, boat-mounted structures, or fittings for those structures. All of the art falls within the field of Applicants' endeavor and would have commanded itself to the inventors' attention in considering the objective they were seeking to achieve. Accordingly, the

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[2] Even if the Examiner should be persuaded by the expected argument by Applicants that the *Powerboat* article does not contain an enabling disclosure, the article is still prior art under § 103(a) for all that it teaches. *See Symbol Technologies, Inc. v. Opticon Inc.*, 935 F.2d 1569, 1578, 19 U.S.P.Q.2d 1241, 1247 (Fed. Cir. 1991); MPEP 2121.01.

hypothetical person of ordinary skill in the art at the time of Applicants' invention would have been familiar with each of these prior art teachings. *See* MPEP 2141.01(a) and 2141.03.

Comparing the claimed invention with the three primary references — the *Powerboat* article, the "HIT IT!" video, and the public use events described in the King Declaration — only one notable difference is apparent. That is, certain of the reissue claims call for a tower that is pivotally attached to a vessel, whereas there is no indication, either way, whether the towers disclosed in those references are pivotally attached. Each reference, however, leaves open the possibility that the tower shown therein might actually have been, or at least could have been, pivotally attached to the boat.

Protestor submits that it would have been obvious to one of ordinary skill in the art to have made pivotable the towers shown in the *Powerboat* article, the "HIT IT!" video, and the King Declaration. For starters, it was widely recognized in the art that boats frequently need to pass underneath bridges or into boat houses. *See, e.g.*, Barker patent, at col. 1, lines 8-18; Harrelson, II patent, at col. 3, lines 11-15; Schmitt Declaration, ¶ 11. Vertical structures mounted atop boats, therefore, commonly were pivotally attached so that they could rotate downward to permit the boats to pass under low clearances. Prior to Applicants' invention, this had been done with a wide variety of structures, ranging from towers, to T-tops, to antennae, to canopies, to masts. In fact, Mr. Schmitt states in his Declaration that "[p]rior to March 9, 1997, G.G. Schmitt & Sons Inc. had designed and sold many photo towers, observation towers, and T-tops that were made to hinge at their base for passage underneath low clearances and storage purposes." Schmitt Declaration, ¶ 12. Also, the Murray patent discloses U-shaped support structures that are pivotally attached on opposite sides of a boat, using pivotal mountings that are essentially the same as those disclosed in the '350 patent. *Compare* the '350 patent, Figs. 7 and 8, *with* Murray,

Fig. 4. The Murray patent makes clear that, at least as of its filing date of March 19, 1996, such pivotal mountings were "well known" and "commercially available." Murray, col. 3, lines 47-51; *see also* the 1987 Marine Catalog.

For at least these reasons, it would have been plainly obvious to one of ordinary skill in the art to have made the towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration pivotable, if they were not already. Mr. Schmitt, in his Declaration, concurs:

> Throughout the time period from September 1995 to March 1998, it was widely recognized in the marine hardware industry that boats frequently need to pass underneath bridges or into boat houses. Accordingly, boat-mounted structures that protruded substantially above the boat often were hinged at their base, using commercially-available hinged tower fittings such as shown, for example, on page 34 of a 1987 Taco Supply Marine Catalog. In that way, the structures could be rotated downward whenever it was necessary for the boat to pass under a low clearance.

Schmitt Declaration, ¶ 11.

Any evidence of secondary considerations that Applicants might offer to rebut an obviousness rejection should not be availing. For example, in order for evidence of commercial success to be of any probative value, Applicants would have to prove that the commercial success is attributable to the one feature of their claimed invention that is not disclosed in any of the primary references — namely, the pivotal attachment of the tower to the boat. That is, Applicants would not only have to show that tower-equipped boats within the scope of their claims have been commercially successful, but that the reason for that success is due to the pivotability of the tower, and not due to the mere provision of a tower amidships or qualities of the boat itself. *See* MPEP 716.03; *see also Lamont v. Berguer*, 7 U.S.P.Q.2d 1580, 1582 (Bd. Pat. App. & Interferences 1988) (rejecting a patentee's evidence of commercial success where

the patentee failed to prove that the commercial success was the result of an inventive feature as opposed to features found in the prior art).

Applicants also might argue that others in the industry have copied Correct Craft's lead in offering wakeboard towers as standard equipment on ski boats. That much, however, is irrelevant. What matters is whether others in the industry have copied the pivotal attachment feature. To prove this, Applicants would have to show that others in the industry offer pivotable towers *and* that this is a result of copying rather than independent development. Furthermore, Applicants would have to disprove the very realistic possibility that any copying is attributable to other factors, such as a lack of concern that the '350 patent is valid, rather than a lack of independent technical know-how. *See* MPEP 716.06; *see also Cable Electric Products, Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1028, 226 U.S.P.Q. 881, 889 (Fed. Cir. 1985) (noting that "[r]ather than supporting a conclusion of obviousness, copying could have occurred out of a lack of concern for patent property, in which case it weighs neither for nor against the nonobviousness of a specific patent"). Protestor has reason to believe that a very small percentage of those companies to whom Correct Craft has offered a license under the '350 patent have actually taken one. This, Protestor submits, is due to a widely-held belief in the industry that the claims of the '350 patent are invalid over the prior art. Those that have taken licenses probably are relatively small businesses that merely decided it would be cheaper to take a license than to litigate the validity of the patent in court. If nothing else, the foregoing demonstrates that evidence concerning the state of mind of third parties plays a central role in evaluating whether there has in fact been copying by others.

Finally, in a case like this, where the differences between the prior art and the claimed invention are so slight (pivotal attachment vs. non-pivotal attachment) and where the rest

of the *Graham* factors overwhelmingly point to a conclusion of obviousness, secondary considerations cannot outweigh indisputable evidence of obviousness. *See Sibia Neurosciences, Inc. v. Cadus Pharm. Corp.*, 2000 U.S. App. LEXIS 22516, at *26 (Fed. Cir. Sep. 6, 2000) (discounting the significance of secondary considerations where there were "express teachings in the prior art that would have motivated one of ordinary skill" to come up with the claimed invention); *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 768-69, 9 U.S.P.Q.2d 1417, 1426-27 (Fed. Cir. 1988) (finding obviousness despite strong evidence of commercial success, noting that secondary considerations "do not control the obviousness conclusion").

Accordingly, claims 1-11, 13, 14, 20, 21, 23, 31, 32, 34, 37, and 40-49 should be rejected under § 103(a) as being unpatentable over any one of the *Powerboat* article, the "HIT IT!" video, and the public use events described in the King Declaration, in view of one or more of Barker, Harrelson, II, Green, Murray, and the 1987 Marine Catalog, as well as the ski boat pictures contained in the September 1995 issue of *Powerboat* magazine.

IV. CLOSING REMARKS

For at least the reasons stated above, claims 1-49 of the subject reissue application should be rejected under 35 U.S.C. §§ 102(b) and 103(a). Moreover, because there is absolutely nothing in the disclosure of the reissue application that constitutes a patentable advancement over the prior art discussed in this Protest, Applicants should not be granted a patent at all on this application.

Respectfully submitted,

Dated: October 27, 2000

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing PROTEST UNDER 37 C.F.R. § 1.291 TO PATENTEE'S APPLICATION FOR REISSUE OF U.S. PATENT NO. 5,979,350 (including Appendix A and Exhibits 1-13) was served this 27th day of October, 2000, via first class mail to:

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APPENDIX A

REISSUE CLAIMS	PRIOR ART
1. A method for improving aerial characteristics of a performance by a performer using a water sport implement and being towed behind a vessel while maintaining the stability of the vessel, the method comprising the steps of:	The *Powerboat* article, the "HIT IT!" video, and the King Declaration each discloses the use of a tower-equipped boat to improve the aerial characteristics of a performance by a performer using either an Air Chair or a wakeboard, while maintaining the stability of the boat. Specifically, attaching a tow rope near the top of the tower enabled the performer to get more "air" or experience an "upward pull."
providing a vessel behind which the performer is to be towed, the vessel including a bow, a foredeck aft of the bow, a stern, opposing sides extending from the bow to the stern, and an operator station positioned amidships between the sides;	The boats disclosed in the "HIT IT!" video and the King Declaration each included a bow, a foredeck aft of the bow, a stern, opposing sides extending from the bow to the stern, and an operator station positioned amidships between the sides. The *Powerboat* article shows the boat from behind, and, therefore, all that can be seen is a stern, opposing sides, and an operator station positioned amidships between the sides. Although not shown, the boat necessarily must also have had a bow, and probably also a foredeck aft of the bow, as this was a common feature of prior art ski boats. *See, e.g.*, Exhibit 12.
fitting a first relatively rigid vertical support structure to a first one of the sides and fitting a second relatively rigid vertical support structure to a second one of the sides, and then extending a generally horizontal bridging portion between upper extremities of the first and second vertically extending support structures, amidships and at a height substantially above the operator station;	The towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each comprised a pair of rigid vertical support structures fitted to respective sides of the boat, as well as a horizontal bridging portion extending between upper extremities of the vertical support structures, amidships, and at a height substantially above the operator station.

pivotally attaching the first and second vertically extending support structures to the respective sides of the vessel and positioning the first and second vertically extending support structures for rotating to a generally horizontal position;	Neither the *Powerboat* article, the "HIT IT!" video, nor the King Declaration indicates whether the towers disclosed therein were pivotally mounted. For reasons explained in the accompanying Protest, it would have been obvious to one skilled in the art to have pivotally attached the towers to the boats so that the boats could pass underneath a bridge or into a boat house, particularly in view of the hinged tower fittings disclosed in the 1987 Marine Catalog and the teachings of the Barker, Harrelson, II, and Murray patents. *See also* Schmitt Declaration, ¶¶ 11 and 12.
attaching a tow rope to the horizontally extending bridging portion; and	Each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration discloses a tow rope attached to the horizontal bridging portion of the tower.
operating the vessel in a body of water while towing the performer from the horizontally extending bridging portion.	Each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration discloses that the boat was operated in a body of water while towing the performer from the horizontal bridging portion of the tower.

2. The method according to claim 1, wherein the fitting step comprises the steps of: providing each of the first and second vertical support structures with a forward vertical support element and an aft vertical support element; and fixedly attaching a longitudinally extending bar between each of the forward and aft vertical support elements for forming a skeletal frame.	The vertical support structures of each of the towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration included a forward leg and an aft leg. At least one longitudinally-extending bar was attached between the forward and aft legs of each of the vertical support structures.

3. The method according to claim 2, wherein the longitudinally extending bar attaching step comprises the step of attaching the bar generally parallel to the floor of the vessel.	The *Powerboat* article, the "HIT IT!" video, and the King Declaration each disclose that the longitudinally-extending bars were attached parallel to the floor of the boat.

4. The method according to claim 2, further comprising the step of rearwardly angling each of the forward vertical support elements.	Each of the forward legs disclosed in the "HIT IT!" video and the King Declaration was rearwardly angled. It is not clear from the *Powerboat* article whether the forward legs were rearwardly angled.

5. The method according to claim 1, wherein the first and second one of the sides correspond to starboard and port deck portions, respectively.	The tower disclosed in the King Declaration clearly was mounted to starboard and port deck portions of the boat. The tower shown in the *Powerboat* article also appears to have been mounted to starboard and port deck portions of the boat. *See* Schmitt Declaration, ¶ 10.

6. The method according to claim 1, wherein the first and second one of the sides correspond to starboard and port floor portions, respectively.	The tower shown in the "HIT IT!" video appears to have been mounted to starboard and port floor portions of the boat.

7. The method according to claim 1, wherein the height above the level of the operator station is at least six feet above the vessel floor.	Each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration discloses that the tow rope was attached to the horizontal bridging portion of the tower at a height at least six feet above the floor of the boat.

8. The method according to claim 1, wherein the bridging portion comprises a tow rope connecting element for attaching the tow rope thereto, and wherein the attaching step comprises the step of attaching the tow rope to the tow rope connecting element.	The horizontal bridging portion of the tower shown in the "HIT IT!" video included a fitting to which the tow rope was attached. It is not clear from the *Powerboat* article or the King Declaration whether there was a separate tow rope connecting element or whether the tow rope simply was tied directly to the horizontal bridging portion of the tower.

9. The method according to claim 1, wherein the fitting step includes the step of providing forward and aft U-shaped support structures and forming a skeletal frame from a combination of the first and second vertical support structures and the horizontal bridging portion.	The towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each comprised a pair of forward legs and a pair of aft legs, all of which were joined to the horizontal bridging portion to form a skeletal frame. The pair of forward legs were joined to the front of the horizontal bridging portion to form a forward U-shaped support structure. Similarly, the pair of aft legs were joined to the back of the horizontal bridging portion to form an aft U-shaped support structure. Forward and aft U-shaped support structures like those disclosed in the '350 patent are also shown in Fig. 1 of the Green patent.

10. The method according to claim 1, wherein the support structures and bridging portion are formed from aluminum.	The tower disclosed in the King Declaration was made of aluminum. All that can be ascertained about the material from which the towers shown in the *Powerboat* article and the "HIT IT!" video were formed is that they were made of some type of metal. Aluminum was commonly used for boat towers, and, therefore, would have been an obvious choice for the towers shown in the article and video. *See, e.g.*, Green, col. 1, lines 4-5 and 64-65; King Declaration, ¶ 2; Schmitt Declaration, ¶ 1.

11. The method according to claim 1, further comprising the step of attaching a plurality of anchoring plates to the vessel, and wherein the fitting step includes the step of fitting each of lower extremities of the vertical support structures to one of the plurality of anchoring plates.	The King Declaration discloses a plurality of anchoring plates for attaching the tower to the boat. It is not clear from either the *Powerboat* article or the "HIT IT!" video whether a plurality of anchoring plates were used to attach the towers to the boats. However, anchoring plates of some kind inherently must have been used; otherwise the towers would have moved around or toppled over. In any event, the provision of anchoring plates would have been an obvious fabrication detail, especially in view of the anchoring plates shown in Fig. 4 of the Green patent and Fig. 4 of the Murray patent, and in view of the tower fittings disclosed in the 1987 Marine Catalog. *See also* Schmitt Declaration, ¶ 11.

12. A method for towing a performer using a water sport implement and being towed behind a vessel while maintaining the stability of the vessel, the method comprising the steps of:	The *Powerboat* article, the "HIT IT!" video, and the King Declaration each disclose the use of a tower-equipped boat to tow a performer using either an Air Chair or a wakeboard, while maintaining the stability of the boat.
providing a vessel behind which the performer is to be towed, the vessel including a bow, a foredeck aft of the bow, a stern, opposing sides extending from the bow to the stern, and an operator station positioned amidships;	The boats disclosed in the "HIT IT!" video and the King Declaration each included a bow, a foredeck aft of the bow, a stern, opposing sides extending from the bow to the stern, and an operator station positioned amidships. The *Powerboat* article shows the boat from behind, and, therefore, all that can be seen is a stern, opposing sides, and an operator station positioned amidships. Although not shown, the boat necessarily must also have had a bow, and probably also a foredeck aft of the bow, as this was a common feature of prior art ski boats. *See, e.g.*, Exhibit 12.

fitting a first relatively rigid U-shaped support structure across the beam of the vessel, amidships, and extending substantially above the level of the operator station;	The towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each included a pair of forward legs that were joined together by a horizontal bridging portion to form a first U-shaped support structure fitted across the beam of the boat, amidships, and extending substantially above the level of the operator station. U-shaped support structures like those disclosed in the '350 patent are also shown in Fig. 1 of the Green patent.
rearwardly angling the first U-shaped structure;	The first U-shaped support structure disclosed in each of the "HIT IT!" video and the King Declaration was rearwardly angled. It is not clear from the *Powerboat* article whether the first U-shaped support structure was rearwardly angled.
fitting a second relatively rigid U-shaped support structure to the sides and across the beam of the vessel, amidships, and extending substantially above the level of the operator station, the first U-shaped support structure forward of the second U-shaped structure with the operator station located in an area between fittings of the first and second U-shaped structures at the respective sides;	The towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each included a pair of aft legs that were joined together by the horizontal bridging portion to form a second U-shaped support structure fitted across the beam of the boat, amidships, and extending substantially above the level of the operator station. The first U-shaped support structure was positioned forward of the second U-shaped support structure, and the operator station was located between the base of the first U-shaped support structure and the base of the second U-shaped support structure.
attaching a plurality of longitudinally extending bars between the U-shaped support structures so that the first and second support structures form a skeletal frame extending above the operator station;	A plurality of longitudinally-extending bars were attached between the first and second U-shaped support structures of each of the towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration, to form a skeletal frame that extended above the operator station.
attaching a tow rope to an upper portion of the skeletal frame; and	Each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration discloses a tow rope attached to the horizontal bridging portion of the tower.

operating the vessel in a body of water while towing the performer.	Each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration discloses that the boat was operated in a body of water while towing the performer from the horizontal bridging portion of the tower.
13. The method according to claim 12, further comprising the step of pivotally attaching at least one of the U-shaped structures to the respective sides of the vessel, so as to permit the skeletal frame to be rotated downwardly onto a deck portion of the vessel.	Neither the *Powerboat* article, the "HIT IT!" video, nor the King Declaration indicates whether the towers disclosed therein were pivotally mounted. For reasons explained in the accompanying Protest, it would have been obvious to one skilled in the art to have pivotally attached the towers to the boats so that the boats could pass underneath a bridge or into a boat house, particularly in view of the hinged tower fittings disclosed in the 1987 Marine Catalog and the teachings of the Barker, Harrelson, II, and Murray patents. *See also* Schmitt Declaration, ¶¶ 11 and 12.
14. The method according to claim 13, further comprising the step of downwardly rotating the skeletal frame onto the foredeck of the vessel.	See comments re claim 13.
15. The method according to claim 12, wherein the longitudinally extending bar attaching step comprises the step of attaching the bar generally parallel to the floor of the vessel.	Each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration discloses that each of the longitudinally-extending bars were attached parallel to the floor of the boat.
16. The method according to claim 12, further comprising the step of attaching the U-shaped structures to starboard and port deck portions, respectively.	The tower disclosed in the King Declaration clearly was mounted to starboard and port deck portions of the boat. The tower shown in the *Powerboat* article also appears to have been mounted to starboard and port deck portions of the boat. *See* Schmitt Declaration, ¶ 10.

17. The method according to claim 12, further comprising the step of attaching the U-shaped structures to starboard and port floor portions, respectively.	The tower shown in the "HIT IT!" video appears to have been mounted to starboard and port floor portions of the boat.

18. The method according to claim 12, wherein the skeletal frame extends to a height above the level of the operator station that is at least six feet above the vessel floor.	Each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration discloses that the tower extended to a height above the level of the operator station that was at least six feet above the floor of the boat.

19. The method according to claim 12, further comprising the step of attaching a tow rope connecting element to the upper portion of the skeletal frame for attaching the tow rope thereto, and wherein the attaching step comprises the step of attaching the tow rope to the tow rope connecting element.	The horizontal bridging portion of the tower shown in the "HIT IT!" video included a fitting to which the tow rope is attached. It is not clear from the *Powerboat* article or the King Declaration whether there was a separate tow rope connecting element or whether the tow rope simply was tied directly to the horizontal bridging portion of the tower.

20. The method according to claim 12, wherein the tower is formed from aluminum.	The tower disclosed in the King Declaration was made of aluminum. All that can be ascertained about the material from which the towers shown in the *Powerboat* article and the "HIT IT!" video were formed is that they were made of some type of metal. Aluminum was commonly used for boat towers, and, therefore, would have been an obvious choice for the towers shown in the article and video. *See, e.g.*, Green, col. 1, lines 4-5 and 64-65; King Declaration, ¶ 2; Schmitt Declaration, ¶ 1.

21. The method according to claim 12, further comprising the step of attaching a plurality of anchoring plates to the vessel, and wherein the fitting step includes the step of fitting each of lower extremities of the U-shaped support structures to one of the plurality of anchoring plates.	The King Declaration discloses a plurality of anchoring plates for attaching the tower to the boat. It is not clear from either the *Powerboat* article or the "HIT IT!" video whether a plurality of anchoring plates were used to attach the towers to the boats. However, anchoring plates of some kind inherently must have been used; otherwise the towers would have moved around or toppled over. In any event, the provision of anchoring plates would have been an obvious fabrication detail, especially in view of the anchoring plates shown in Fig. 4 of the Green patent and Fig. 4 of the Murray patent, and in view of the tower fittings disclosed in the 1987 Marine Catalog. *See also* Schmitt Declaration, ¶ 11.

22. A towing apparatus for improving aerial characteristics of a performance by a performer using a water sport implement, the towing apparatus comprising:	The *Powerboat* article, the "HIT IT!" video, and the King Declaration each disclose the use of a tower-equipped boat to improve the aerial characteristics of a performance by a performer using either an Air Chair or a wakeboard. Specifically, attaching a tow rope near the top of the tower enabled the performer to get more "air" or experience an "upward pull."
a vessel behind which the performer is to be towed, the vessel including a bow, a stern and an operator station positioned amidships between opposing sides;	The boats disclosed in the "HIT IT!" video and the King Declaration each included a bow, a stern, and an operator station positioned amidships between opposing sides of the boat. The *Powerboat* article shows the boat from behind, and, therefore, all that can be seen is a stern and an operator station positioned amidships between opposing sides of the boat. Although not shown, the boat necessarily must also have had a bow.

a first relatively rigid vertical support structure fitted between the sides of the vessel at a point forward of the operator station;	The towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each included a pair of legs fitted between the sides of the boat at a position forward of the operator station. Together, those legs formed a first relatively rigid vertical support structure.
a second relatively rigid vertical support structure fitted between the sides of the vessel aft of the first relatively rigid vertical support structure;	The towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each included a pair of legs fitted between the sides of the boat aft of the first vertical support structure. Together, those legs formed a second relatively rigid vertical support structure.
a generally horizontal bridging portion extending between upper portions of the first and second vertically extending support structures, at a height substantially above the level of the operator station; and	The towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each included a horizontal bridging portion extending between upper portions of the first and second vertical support structures, at a height substantially above the level of the operator station.
a tow rope attached to the horizontally extending bridging portion for towing the performer from the horizontally extending bridging portion while operating the vessel in a body of water.	Each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration discloses a tow rope attached to the horizontal bridging portion of the tower for towing the performer from the horizontal bridging portion while operating the boat in a body of water.

23. The apparatus according to claim 22, further comprising attaching means for attaching the first and second generally vertically extending support structures to the respective sides of the vessel, the attaching means operable so as to permit the first and second support structures to be rotated downwardly so that the vessel may pass underneath a bridge or into a boat house.	For purposes of 35 U.S.C. § 112, sixth paragraph, the particular attachment means disclosed in the '350 patent is shown in Figs. 7 and 8, and described at col. 5, lines 8-11. Specifically, the attachment means consists of four anchoring plates 124, each including "a shaft 126 which terminates in a free end 128 having a through hole for receipt of a pivot pin or bolt 130." Neither the *Powerboat* article, the "HIT IT!" video, nor the King Declaration indicates whether the towers disclosed therein were pivotally mounted using anchoring plates or their equivalent. For reasons explained in the accompanying Protest, it would have been obvious to one skilled in the art to have pivotally attached the towers to the boats so that the boats could pass underneath a bridge or into a boat house, particularly in view of the hinged tower fittings disclosed in the 1987 Marine Catalog and the teachings of the Barker, Harrelson, II, and Murray patents. *See also* Schmitt Declaration, ¶¶ 11 and 12. Further, it would have been obvious to have used anchoring plates such as those shown in Figs. 7 and 8 of the '350 patent, or their equivalent, especially in view of the anchoring plates shown in Fig. 4 of the Green patent and Fig. 4 of the Murray patent, and in view of the tower fittings disclosed in the 1987 Marine Catalog.

24. The apparatus according to claim 22, wherein each of the first and second vertical support structures comprise a forward vertical support element and an aft vertical support element, and wherein the apparatus further comprises a plurality of longitudinally extending bars fixedly attached between each of the forward and aft vertical support elements thus forming a skeletal frame.	Initially, claim 24 appears to be inconsistent with claim 22, which recites that the second vertical support structure is positioned *aft* of the first vertical support structure (as opposed to claim 1, for example, wherein the first and second support structures are disposed across from each other). Notwithstanding, the towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each included a pair of forward legs and a pair of aft legs, with a plurality of longitudinally extending bars attached between each forward leg and a respective aft leg, thus forming a skeletal frame.

25. The apparatus according to claim 24, wherein the plurality of longitudinally extending bars are generally parallel to the floor of the vessel.	In the *Powerboat* article, the "HIT IT!" video, and the King Declaration, each of the longitudinally extending bars was attached parallel to the floor of the boat.

26. The apparatus according to claim 24, wherein the forward vertical support element is rearwardly angled for having its lower extremity forward of its upper extremity.	Each of the forward legs of the towers disclosed in the "HIT IT!" video and the King Declaration was rearwardly angled and, therefore, had its lower extremity forward of its upper extremity. It is not clear from the *Powerboat* article whether the forward legs were rearwardly angled.

27. The apparatus according to claim 22, wherein the first and second one of the sides correspond to starboard and port deck portions, respectively.	The tower disclosed in the King Declaration clearly was mounted to starboard and port deck portions of the boat. The tower shown in the *Powerboat* article also appears to have been mounted to starboard and port deck portions of the boat. *See* Schmitt Declaration, ¶ 10.

28. The apparatus according to claim 22, wherein the first and second one of the sides correspond to starboard and port floor portions, respectively.	The tower shown in the "HIT IT!" video appears to have been mounted to starboard and port floor portions of the boat.

29. The apparatus according to claim 22, wherein the height above the level of the operator station is at least six feet above the vessel floor.	In each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration, the horizontal bridging portion of the tower to which the tow rope is attached was at least six feet above the floor of the boat.

30. The apparatus according to claim 22, further comprising a tow rope connecting element attached to the bridging portion for attaching the tow rope thereto.	The horizontal bridging portion of the tower shown in the "HIT IT!" video included a fitting to which the tow rope was attached. It is not clear from the *Powerboat* article or the King Declaration whether there was a separate tow rope connecting element or whether the tow rope simply was tied directly to the horizontal bridging portion of the tower.

31. The apparatus according to claim 22, wherein the skeletal frame is formed from aluminum.	The tower disclosed in the King Declaration was made of aluminum. All that can be ascertained about the material from which the towers shown in the *Powerboat* article and the "HIT IT!" video were formed is that they were made of some type of metal. Aluminum was commonly used for boat towers, and, therefore, would have been an obvious choice for the towers shown in the article and video. *See, e.g.*, Green, col. 1, lines 4-5 and 64-65; King Declaration, ¶ 2; Schmitt Declaration, ¶ 1.

32. The apparatus according to claim 22, further comprising a plurality of anchoring plates attached to the vessel, and wherein each of the lower extremities of the vertical supports are fitted to one of the plurality of anchoring plates.	The King Declaration discloses a plurality of anchoring plates for attaching the tower to the boat. It is not clear from either the *Powerboat* article or the "HIT IT!" video whether a plurality of anchoring plates were used to attach the towers to the boats. However, anchoring plates of some kind inherently must have been used; otherwise the towers would have moved around or toppled over. In any event, the provision of anchoring plates would have been an obvious fabrication detail, especially in view of the anchoring plates shown in Fig. 4 of the Green patent and Fig. 4 of the Murray patent, and in view of the tower fittings disclosed in the 1987 Marine Catalog. *See also* Schmitt Declaration, ¶ 11.

33. A towing apparatus for a performer using a water sport implement and being towed behind a vessel while maintaining the stability of the vessel, the vessel having a bow, a stern, opposing sides extending from the bow to the stern, and an operator station located amidships between the opposing sides, the towing apparatus comprising:	The *Powerboat* article, the "HIT IT!" video, and the King Declaration each disclose the use of a tower-equipped boat to tow a performer using either an Air Chair or a wakeboard, while maintaining the stability of the boat. The boats disclosed in the "HIT IT!" video and the King Declaration each included a bow, a stern, opposing sides extending from the bow to the stern, and an operator station located amidships between the opposing sides. The *Powerboat* article shows the boat from behind, and, therefore, all that can be seen is a stern, opposing sides, and an operator station located amidships between the opposing sides. Although not shown, the boat necessarily must also have had a bow.

a first relatively rigid U-shaped support structure for fitting to the sides across the beam of the vessel at a point forward of the operator station and positioned amidships substantially above the level of the operator station;	The towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each included a pair of forward legs that were joined to a horizontal bridging portion to form a first U-shaped support structure fitted across the beam of the boat at a point forward of the operator station and positioned amidships, substantially above the level of the operator station. U-shaped support structures like those disclosed in the '350 patent are also shown in Fig. 1 of the Green patent.
a second relatively rigid U-shaped support structure for fitting to the sides across the beam of the vessel and positioned amidships substantially above the level of the operator station;	The towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each included a pair of aft legs that were joined to the horizontal bridging portion to form a second U-shaped support structure fitted across the beam of the boat and positioned amidships, substantially above the level of the operator station.
a plurality of bars extending between the U-shaped support structures so that the first and second U-shaped support structures in combination with the plurality of bars form a skeletal frame, and wherein the first U-shaped support structure is positioned forward of the second U-shaped support structure; and	A plurality of longitudinally-extending bars were attached between the first and second U-shaped support structures of each of the towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration, to form a skeletal frame. In each tower, the first U-shaped support structure was positioned forward of the second U-shaped support structure.

tow rope attaching means fitted to the upper portion of the skeletal frame for attaching a tow rope thereto.	For purposes of 35 U.S.C. § 112, sixth paragraph, the particular tow rope attaching means disclosed in the '350 patent is shown in Fig. 5 and described at col. 4, lines 49-55. Specifically, the tow rope attaching means consists of "a tow rope connecting element 120 . . . attached to the upper portion of the vertical support unit 100, preferably to the horizontal bridging port [sic] 108 of the aft U-shaped support structure 112 for attaching the tow rope 29 thereto." The horizontal bridging portion of the tower shown in the "HIT IT!" video included a fitting — the same as or at least equivalent to that disclosed in the '350 patent — to which the tow rope was attached. It is not clear from the *Powerboat* article or the King Declaration whether there was a separate tow rope connecting element or whether the tow rope simply was tied directly to the horizontal bridging portion of the tower.

34. The apparatus according to claim 33 further comprising attaching means for attaching the skeletal frame to the vessel, so as to permit the skeletal frame to be rotated downwardly onto a deck portion of the vessel.	For purposes of 35 U.S.C. § 112, sixth paragraph, the particular attachment means disclosed in the '350 patent is shown in Figs. 7 and 8, and described at col. 5, lines 8-11. Specifically, the attachment means consists of four anchoring plates 124, each including "a shaft 126 which terminates in a free end 128 having a through hole for receipt of a pivot pin or bolt 130." Neither the *Powerboat* article, the "HIT IT!" video, nor the King Declaration indicates whether the towers disclosed therein were pivotally mounted using anchoring plates or their equivalent. For reasons explained in the accompanying Protest, it would have been obvious to one skilled in the art to have pivotally attached the towers to the boats so that the boats could pass underneath a bridge or into a boat house, particularly in view of the hinged tower fittings disclosed in the 1987 Marine Catalog and the teachings of the Barker, Harrelson, II, and Murray patents. *See also* Schmitt Declaration, ¶¶ 11 and 12. Further, it would have been obvious to have used anchoring plates such as those shown in Figs. 7 and 8 of the '350 patent, or their equivalent, especially in view of the anchoring plates shown in Fig. 4 of the Green patent and Fig. 4 of the Murray patent, and in view of the tower fittings disclosed in the 1987 Marine Catalog.

35. The apparatus according to claim 33, wherein the longitudinally extending bars are generally parallel to the floor of the vessel.	In the *Powerboat* article, the "HIT IT!" video, and the King Declaration, each of the longitudinally extending bars was positioned parallel to the floor of the boat.

36. The apparatus according to claim 33, wherein the tow rope attaching means comprises a tow rope connecting element fixedly attached to the upper extremity of the skeletal frame.	See comments re claim 33, last clause.

37. The apparatus according to claim 33, further comprising a plurality of anchoring plates for attaching the skeletal frame to the vessel, and wherein each of lower extremities of the U-shaped supports is attached to one of the plurality of anchoring plates.	The King Declaration discloses a plurality of anchoring plates for attaching the tower to the boat. It is not clear from either the *Powerboat* article or the "HIT IT!" video whether a plurality of anchoring plates were used to attach the towers to the boats. However, anchoring plates of some kind inherently must have been used; otherwise the towers would have moved around or toppled over. In any event, the provision of anchoring plates would have been an obvious fabrication detail, especially in view of the anchoring plates shown in Fig. 4 of the Green patent and Fig. 4 of the Murray patent, and in view of the tower fittings disclosed in the 1987 Marine Catalog. *See also* Schmitt Declaration, ¶ 11.

38. A method for improving aerial characteristics of a performance by a performer using a water sport implement and being towed behind a vessel while maintaining the stability of the vessel, the method comprising the steps of:	The *Powerboat* article, the "HIT IT!" video, and the King Declaration each disclose the use of a tower-equipped boat to improve the aerial characteristics of a performance by a performer using either an Air Chair or a wakeboard, while maintaining the stability of the boat. Specifically, attaching a tow rope near the top of the tower enabled the performer to get more "air" or experience an "upward pull."

providing a vessel behind which the performer is to be towed, the vessel including a bow, a foredeck aft the bow, a stern, opposing sides extending from the bow to the stern, and an operator station positioned amidships between the bow and the stern, aft of the foredeck;	The boats disclosed in the "HIT IT!" video and the King Declaration each included a bow, a foredeck aft of the bow, a stern, opposing sides extending from the bow to the stern, and an operator station positioned amidships between the bow and the stern, aft of the foredeck. The *Powerboat* article shows the boat from behind, and, therefore, all that can be seen is a stern, opposing sides, and an operator station positioned amidships. Although not shown, the boat necessarily must also have had a bow, and probably also a foredeck aft of the bow but forward of the operator station, as this was a common feature of prior art ski boats. *See, e.g.*, Exhibit 12.
attaching a rigid vertical bridging support structure at attachment points on each side of the vessel adjacent and substantially abeam the operator station, with a generally horizontal bridging portion of the vertical bridging support structure positioned substantially directly above the operator station;	As noted, the boats disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each included a tower that was attached on each side of the boat, adjacent to and substantially abeam the operator station. Each tower included a horizontal bridging portion positioned substantially directly above the operator station.
attaching a tow rope to the bridging portion;	Each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration discloses a tow rope attached to the horizontal bridging portion of the tower.
imparting sufficient structural strength to the vessel sides, the vertical bridging support structure, the horizontal bridging portion, and the attachment points so as to maintain structural integrity while transferring those rearward forces generated by towing the performer to the vessel sides; and	Evidently, the design features that are visible in the tower-equipped boats disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration were sufficient to maintain their structural integrity while transferring rearward forces generated by towing the performer to the sides of the boats, as each of the boats withstood all the forces generated when the performers were towed.

operating the vessel in a body of water while towing the performer from the horizontal bridging portion.	Each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration discloses that the boat was operated in a body of water while towing the performer from the horizontal bridging portion of the tower.

39. A method for improving aerial characteristics of a performance by a performer using a water sport implement and being towed behind a vessel while maintaining the stability of the vessel, the method comprising the steps of:	The *Powerboat* article, the "HIT IT!" video, and the King Declaration each disclose the use of a tower-equipped boat to improve the aerial characteristics of a performance by a performer using either an Air Chair or a wakeboard, while maintaining the stability of the boat. Specifically, attaching a tow rope near the top of the tower enabled the performer to get more "air" or experience an "upward pull."
providing a vessel behind which the performer is to be towed, the vessel including a bow, a stern and an operator station between opposing sides;	The boats disclosed in the "HIT IT!" video and the King Declaration each included a bow, a stern, and an operator station located between opposing sides of the boat. The *Powerboat* article shows the boat from behind, and, therefore, all that can be seen is a stern and an operator station located between opposing sides of the boat. Although not shown, the boat necessarily must also have had a bow.
fitting a first relatively rigid vertical support structure to a first one of the sides substantially abeam the operator's station, and fitting a second relatively rigid vertical support structure to a second one of the sides substantially abeam the operator's station, and then extending an elevated, generally horizontal bridge portion between the first and second vertically extending support structures, at a height substantially above the operator station;	The towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each comprised a pair of rigid vertical support structures fitted to respective sides of the boat, substantially abeam the operator station. Each tower further comprised a horizontal bridging portion extending between the vertical support structures, at a height substantially above the operator station.
attaching a tow rope to the horizontally extending bridging portion; and	Each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration discloses a tow rope attached to the horizontal bridging portion of the tower.

operating the vessel in a body of water while towing the performer from the horizontally extending bridging portion.	Each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration discloses that the boat was operated in a body of water while towing the performer from the horizontal bridging portion of the tower.

40. The method according to claim 39, further comprising the step of pivotally attaching the first and second generally vertically extending support structures to the respective sides of the vessel, so as to permit the first and second vertical support structures to be rotated downwardly so that the vessel may pass underneath a bridge or into a boathouse.	Neither the *Powerboat* article, the "HIT IT!" video, nor the King Declaration indicates whether the towers disclosed therein were pivotally mounted. For reasons explained in the accompanying Protest, it would have been obvious to one skilled in the art to have pivotally attached the towers to the boats so that the boats could pass underneath a bridge or into a boat house, particularly in view of the hinged tower fittings disclosed in the 1987 Marine Catalog and the teachings of the Barker, Harrelson, II, and Murray patents. *See also* Schmitt Declaration, ¶¶ 11 and 12.

41. A vessel and towing tower for permitting a towed performer to achieve improved aerial characteristics while transmitting rearward towing forces amidships to spaced sides of the vessel, comprising:	The *Powerboat* article, the "HIT IT!" video, and the King Declaration each disclose the use of a tower-equipped boat to improve the aerial characteristics of a performance by a performer using either an Air Chair or a wakeboard. Specifically, attaching a tow rope near the top of the tower enabled the performer to get more "air" or experience an "upward pull." Simply by virtue of attaching the towers to the sides of the boats, rearward forces exerted on the towers were inherently transmitted to the sides of the boats.

a vessel having a bow, a stern, opposing sides extending between the bow and the stern, a vessel operator station located amidships between the bow and the stern and a windshield forward of the operator station, a first portion of the windshield extending laterally across the vessel between the opposing sides;	The boat disclosed in the "HIT IT!" video and the King Declaration each included a bow, a stern, opposing sides extending between the bow and the stern, an operator station located amidships between the bow and the stern, and a laterally-extending windshield located in front of the operator station. The *Powerboat* article shows the boat from behind, and, therefore, all that can be seen is a stern, opposing sides, and an operator station located amidships. Although not shown, the boat necessarily must also have had a bow, and probably also included a windshield located in front of the operator station, as windshields were routinely provided on prior art ski boats. *See, e.g.*, Exhibit 12.

a rigid towing tower including at least four spaced, generally vertically-extending legs, two of the legs comprising a forward leg pair, each leg of the forward leg pair removably attached to a corresponding side of the vessel at an attachment point forward of the laterally-extending first windshield portion, the other two legs comprising a rearward leg pair each of which is removably attached to a corresponding side of the vessel at an attachment point aft of the laterally-extending first windshield portion;	The towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each comprised a pair of forward legs and a pair of aft legs. In the towers disclosed in the "HIT IT!" video and the King Declaration, each of the forward legs was attached to a respective side of the boat at a point forward of the windshield, and each of the aft legs was attached to a respective side of the boat at a point aft of the windshield. Neither the *Powerboat* article, the "HIT IT!" video, nor the King Declaration indicates whether the legs of the towers shown therein were removably attached or permanently affixed to the boat. For reasons explained in the accompanying Protest, it would have been obvious to one skilled in the art to have removably attached the forward and aft legs, so that, by detaching the forward legs, the tower could rotate downward onto a rear portion of the boat, or, by detaching the aft legs, the tower could rotate downward onto a front portion of the boat. This is especially true in view of the hinged tower fittings disclosed in the 1987 Marine Catalog and the teachings of the Barker, Harrelson, II, and Murray patents. Notably, the Murray patent and the 1987 Marine Catalog each show detachable leg connections like that disclosed in the '350 patent. *See also* Schmitt Declaration, ¶¶ 11 and 12.
an overhead tow structure fitted with and supported by the forward and rearward leg pairs substantially above the operator station, the overhead tow structure including lateral and longitudinal members forming a rigid overhead frame;	The towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration each further comprised a horizontal bridging portion fitted with and supported by the forward and aft legs. The horizontal bridging portion was positioned substantially above the operator station and consisted of both lateral and longitudinal components.

a tow rope receiver fitted to an aft one of the lateral members of the overhead frame; and wherein	The aft lateral component of the horizontal bridging portion of the tower shown in the "HIT IT!" video included a fitting to which the tow rope was attached. It is not clear from the *Powerboat* article or the King Declaration whether there was a separate tow rope connecting element or whether the tow rope simply was tied directly to the horizontal bridging portion of the tower.
the first and second leg pairs, the respective attachment points and the overhead tow structure are imparted with sufficient structural strength so as to maintain structural integrity while transferring rearward forces generated by towing the performer to the vessel's sides.	Evidently, the design features that are visible in the tower-equipped boats disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration were sufficient to maintain their structural integrity while transferring rearward forces generated by towing the performer to the sides of the boats, as each of the boats withstood all the forces generated when the performers were towed.

42. The vessel and towing tower according to claim 41, further comprising: other windshield portions extending along the sides; and wherein each attachment point for the rearward leg pair is adjacent a corresponding one of the other windshield portions.	The windshield disclosed in the King Declaration extended along the sides a short distance, but did not reach a point adjacent to the attachments points of the aft legs. The windshield of the boat shown in the "HIT IT!" video did not extend along the sides of the boat, and it is unclear whether the boat shown in the *Powerboat* article included a windshield at all. Nevertheless, a wrap-around windshield would have been an obvious modification, particularly in view of prior art ski boats that had wrap-around windshields. *See, e.g.*, Exhibit 12. Given that it would have been obvious to provide a windshield that extended along the sides of the boat, attachment of the aft legs adjacent to side portions of the windshield would have been obvious, and, in fact, probably would have been required based on the shape of the windshield and the need to position the tower amidships and substantially above the operator station of the boat.

43. The vessel and towing tower according to claim 41, further comprising: each side of the vessel having a generally horizontal deck portion forward of the laterally-extending windshield portion; and wherein each attachment point of the forward leg pair is positioned on the horizontal deck portion of the corresponding side.	The forward legs of the tower disclosed in the King Declaration were attached to a deck portion of the boat forward of the windshield. The forward legs of the tower shown in the *Powerboat* article appear to have been attached to a deck portion of the boat, but since it is unclear whether the boat had a windshield, it is impossible to say whether the forward legs were attached at points forward of the windshield. However, inasmuch as it would have been obvious to provide the boat with a windshield, it also would have been obvious to attach the legs at points forward of the windshield. The forward legs of the tower shown in the "HIT IT!" video appear to have been attached at points forward of the windshield; however, the legs appear to have been attached to the floor of the boat rather than a deck portion.

44. The vessel and towing tower according to claim 41, wherein each leg of the forward leg pair is angled upwardly and rearwardly toward the stern sufficiently to extend vertically over the operator station.	The forward legs disclosed in the "HIT IT!" video and the King Declaration were angled upwardly and rearwardly toward the stern so that they extended above the operator station. It is not clear from the *Powerboat* article whether the forward legs were rearwardly angled.

45. The vessel and towing tower according to claim 41, further comprising at least one support member extending between each leg of the forward leg pair rearwardly to a leg of the rearward leg pair which is attached to the same side of the vessel.	A plurality of longitudinally-extending bars were attached between the forward and aft legs on each side of the towers disclosed in the *Powerboat* article, the "HIT IT!" video, and the King Declaration.

46. The vessel and towing tower according to claim 45, wherein the support member extends rearwardly in a plane generally parallel with the plane of the corresponding side.	In each of the *Powerboat* article, the "HIT IT!" video, and the King Declaration, the longitudinally-extending bars were positioned generally parallel to the plane of the corresponding side of the boat.

47. The vessel and towing tower according to claim 46, further comprising plural rearwardly-extending support members between each leg of the forward leg pair and a corresponding leg of the second leg pair and lying in the plane generally parallel with the corresponding side.	See comments re claim 45.

48. The vessel and towing tower according to claim 41, wherein one leg pair and one of the lateral members of the overhead tow structure are formed together as a generally U-shaped support member.	The pair of forward legs of each of the towers shown in the *Powerboat* article, the "HIT IT!" video, and the King Declaration were joined to the front of the horizontal bridging portion to form a forward U-shaped support structure. Similarly, the pair of aft legs of each of the towers were joined near the back of the horizontal bridging portion to form an aft U-shaped support structure. Forward and aft U-shaped support structures like those disclosed in the '350 patent are also shown in Fig. 1 of the Green patent.

49. The vessel and towing tower according to claim 48, wherein the first leg pair and a first one of the lateral members of the overhead tow structure together form a first generally U-shaped support structure, and wherein the rearward leg pair and a second one of the lateral members of the overhead tow structure together form a second generally U-shaped support structure.	See comments re claim 48.

Exhibit 1

PART ONE OF OUR LONG-TERM TEST

SEPTEMBER 1995

POWERBOAT

ISSN0032-6089

THE WORLD'S LEADING PERFORMANCE BOATING MAGAZINE

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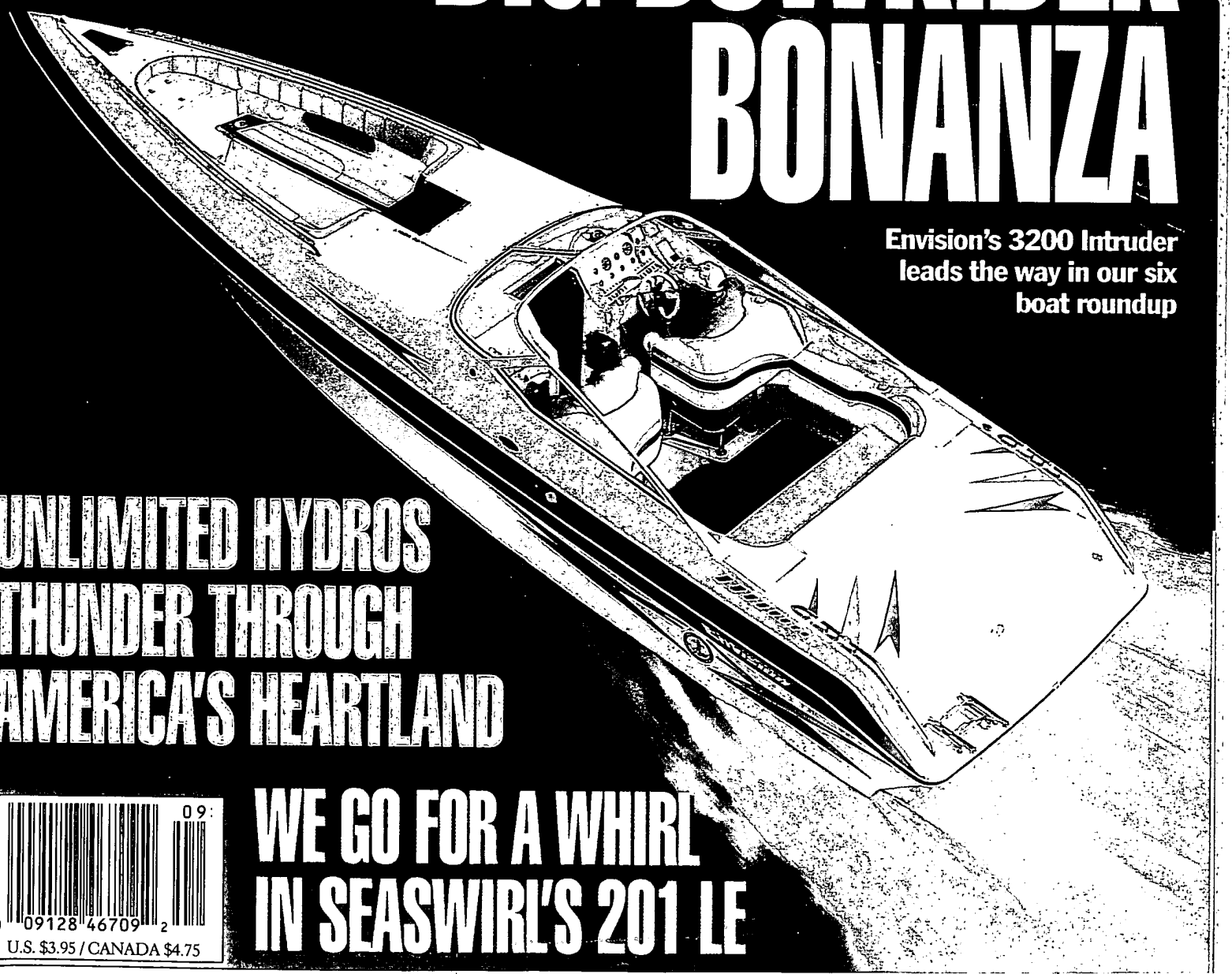

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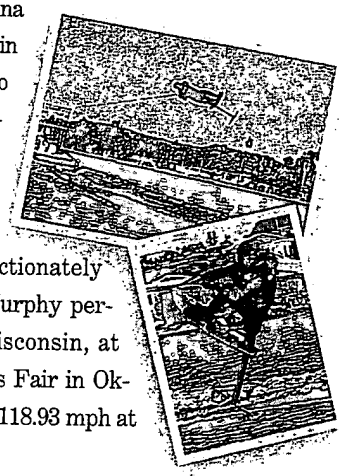
Publisher's Letter

BY JERRY NORDSKOG

TRICK SKIER EXTRAORDINAIRE MIKE MURPHY NEEDED POWERBOAT MAGAZINE to pull off his latest stunt, one in which the high-flyer soared higher than ever before.

Actually, he didn't need us. He needed our photo boat. By tying his tow rope to the top railing of the photo tower on our Nordic 23-footer, *Powerboat Magazine*, Murphy got the lift he needed to soar more than 13' into the air on one of his popular Air Chairs, breaking the previous record by a few feet. Murphy established this new record on the Colorado River across from his home base at Mike Mack's Arizona Shores Ski School.

It was great spending time with Murphy at the River and recalling years gone by when he and his brother, Pat Murphy, raced in the Parker Enduro. My father Bob Nordskog raced up and down the river—Pat even raced there with my dad one year. Mike began waterskiing when he was six years old and as a teenager skied marathon and circle races. He raced the grueling 62-mile Catalina Ski Race a few years after yours truly participated in the granddaddy of ocean ski races. Murphy also captured the checkered flag at the equally challenging 75-miler at Nevada's Lake Mead in 1966.



Hitting the slopes in the late '60s, he learned to do tricks, slalom and jumps on the snow as well as on water, where he also barefooted and was affectionately referred to as "The Father of Hot Dog Skiing." Murphy performed for the Tommy Bartlett Ski Show in Wisconsin, at Marine World Africa USA and in '75 at the World's Fair in Okinawa, Japan. In 1979 he set a speed skiing record of 118.93 mph at California's Long Beach Marine Stadium.

Murphy worked with Bud Holst in the mid-'70s, helping him develop the "Knee Skee," the forerunner to the kneeboard, which was invented by Holst. Later, at the ski school in Parker, Ariz., he developed the "Tunnel Board"—a kneeboard with a tunnel-bottom design.

Always thinking, Murphy came up with an idea about putting a hydrofoil on a kneeboard in 1981 and got together with Bob Wooley. They made a prototype but determined it was too uncomfortable and made riders prone to leg injuries from riding on their knees for prolonged periods.

{*Continued On Page 92*}

POWERBOAT
THE WORLD'S LEADING PERFORMANCE BOATING MAGAZINE

ROBERT A. NORDSKOG
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GERALD C. NORDSKOG
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POWERBOAT (ISSN # 0032-6089) is published monthly except November by Nordskog Publishing Inc., 1691 Spinnaker Drive, Suite 206, Ventura, CA 93001. Elinor T. Nordskog, Chairman, Gerald C. Nordskog, President. Address editorial material to the attention of the editors. The editors are not responsible for unsolicited manuscripts or photographs. Subscription rate: U.S. possessions, 1 year $27; 2 years $49; 3 years $69. Canada, Mexico and elsewhere, 1 year U.S. $38; 2 years U.S. $70; 3 years U.S. $102. Single copy $3.95. Second-class postage paid at Ventura, CA and additional mailing office. **Postmaster:** send change of address to POWERBOAT, P.O. Box 462926, Escondido, CA 92046-9843.

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PUBLISHER

{*Continued From Page 4*} A stand-up model was considered, but ultimately Wooley and Murphy decided a sit-down version was the way to go. Eventually they called the product the Air Chair, after experimenting with two skis for awhile and settling on a mono-ski design that actually looks a lot like a short wakeboard or kneeboard.

After considerable testing the Air Chair was brought to market in 1989. It sold well initially, and is really beginning to take off now. POWERBOAT reported on the development of the product in its infancy when then-Senior Editor Eric Colby spent a day with Wooley out at Castaic Lake learning to fly. (see "Sit On It", October, 1992, page 70). Since then, it's come a long way—the Bud Ski Tour is using the Air Chair for tricks competitions at various stops.

While "getting air" is a snap with the Air Chair, people love it because it is so easy to learn to ride. The Air Chair requires no athleticism or physical prowess. In fact, the more still you can stay on it, the better off you are. One size fits everyone from small children to large adults. Because you ride the Air Chair in a seated position, it is also attractive to paraplegics. Getting started is easy. In the taxiing position, the board is still in contact with the water. Once the rider gets comfortable, he or she pulls down on the rope, keeping arms out in front. The blade tilts back slightly and the Air Chair lifts off the water, riding only on the hydrofoil. Another bonus, any boat, from personal watercraft on up, can pull an Air Chair and it can be ridden at speeds of 15 to 25 mph.

Murphy has mastered the art of skiing and tricks and proclaims it's easy to learn how to ride the device. "Big" Al Wagner, an 85-year-old man and neighbor of Murphy's at Canyon Lake, Calif., is the oldest known Air Chair rider. Mike's mother, Mary Murphy, who is 77 years young also rides the Air Chair and can be seen in its training video.

I wouldn't recommend that any novices go out to try to beat Murphy's new 13' world height record, unless of course you have access to POWERBOAT'S photo boat. But for those who've tried other water toys and want a new thrill, I suggest giving it a whirl. You can sit right down and soar to new heights. PBM

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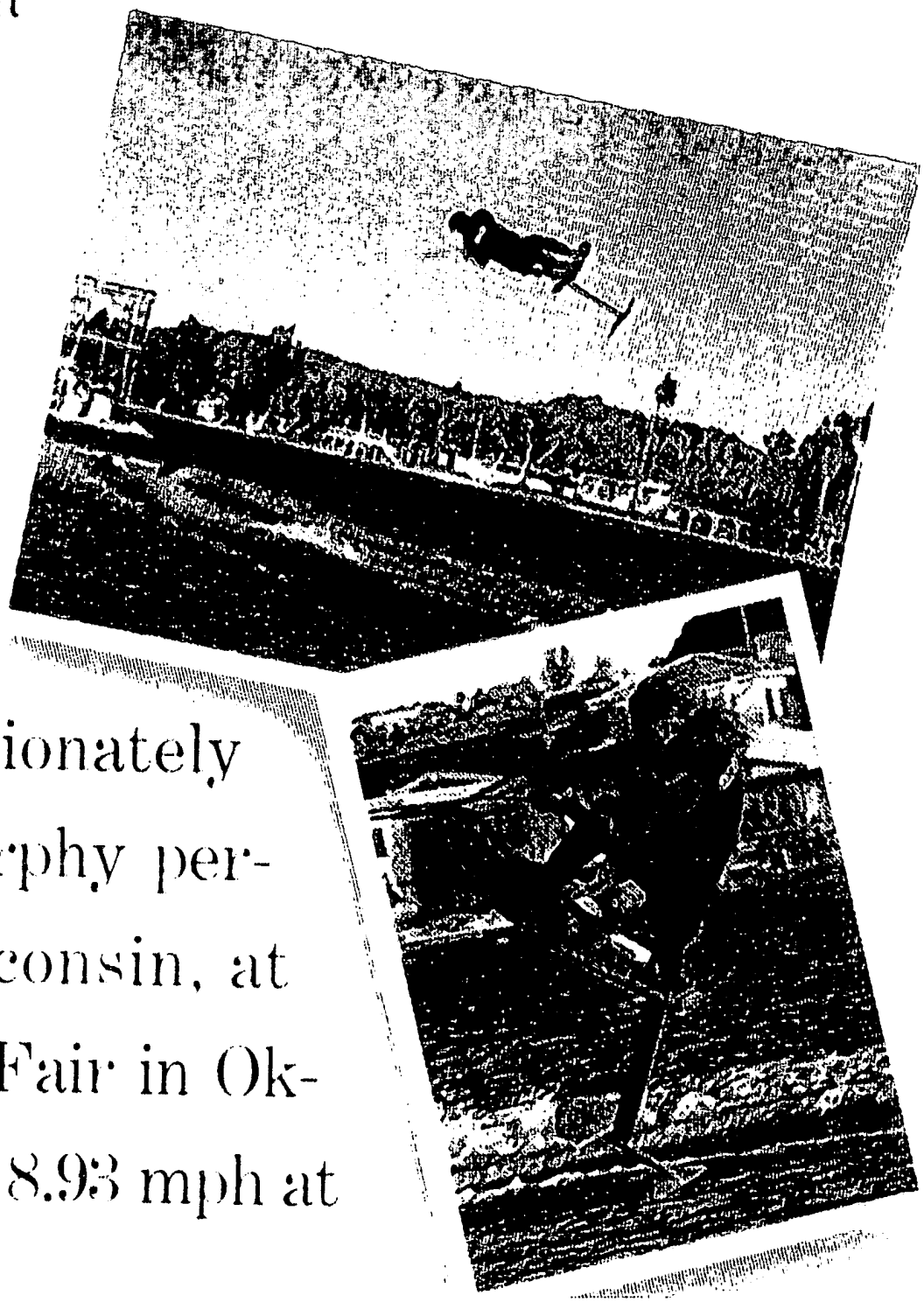
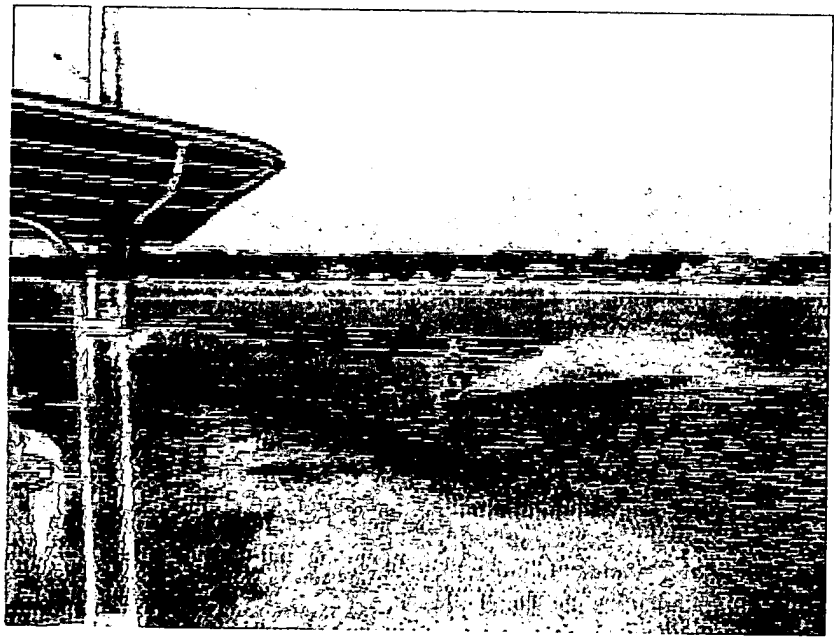
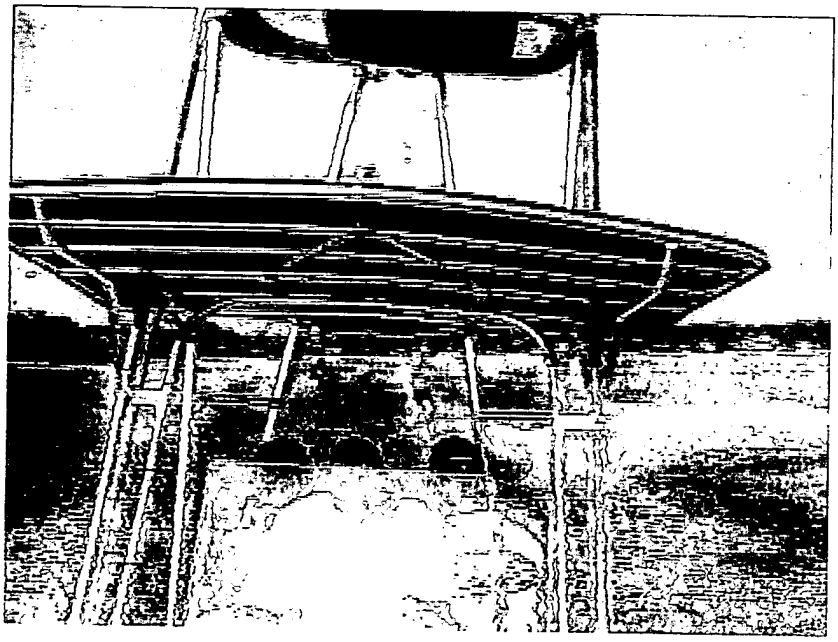
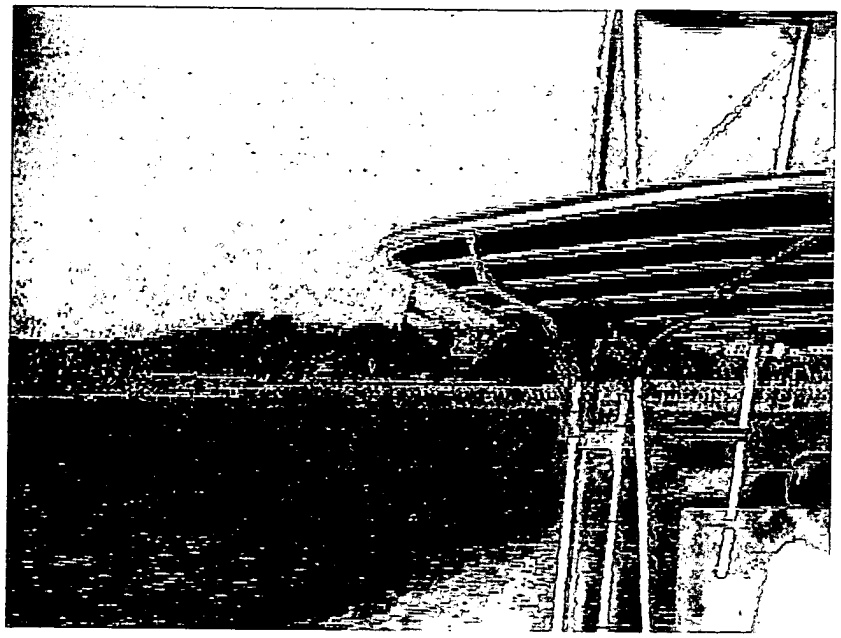
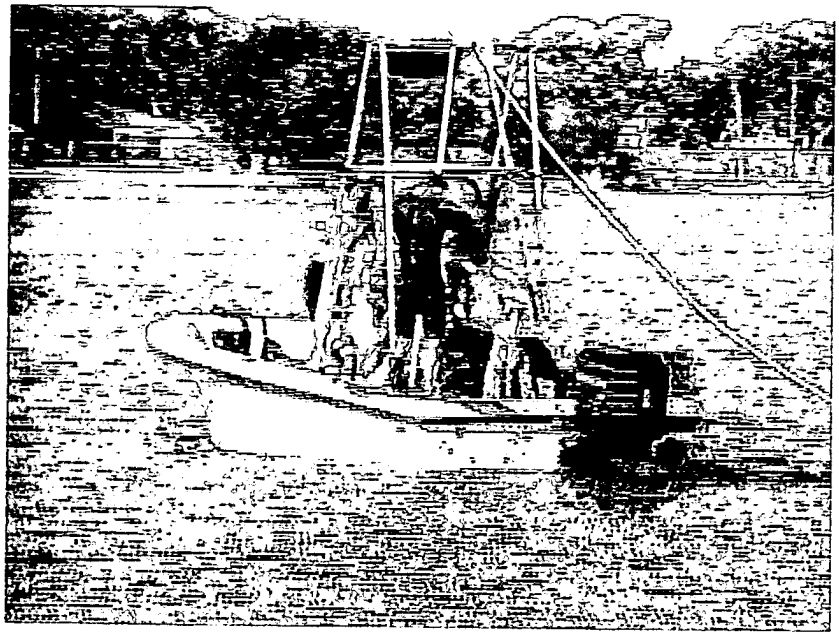










(3)

DECLARATION OF ARTHUR KREHBIEL

I, ARTHUR KREHBIEL declare the truth of the following statements:

1. During the years 1996 and 1997, I was employed by FLF Films, Inc., of Truckee, California.

2. While at FLF Films, Inc., I helped produce a video entitled "HIT IT!".

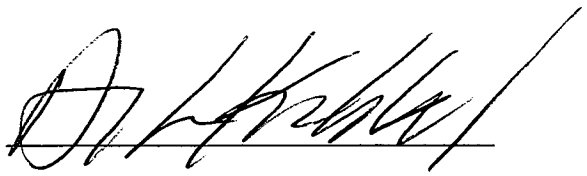
3. Upon information and belief, an advertisement for the "HIT IT!" video appeared in the December 1996 issue of *Wake Boarding Magazine*.

4. FLF Films, Inc. first shipped the "HIT IT!" video to customers no later than February 1, 1997, in plenty of time for customers to have received it before March 9, 1997.

5. I hereby affirm that all statements made on the basis of my own knowledge are true and that all statements made on information and belief are believed to be true. I understand that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001.

October 19 2000

EXECUTED ON THIS ____ DAY OF SEPTEMBER, 2000.



ARTHUR KREHBIEL

FREE BOAT GIVEAWAY PAGE 118

AUGUST 1996

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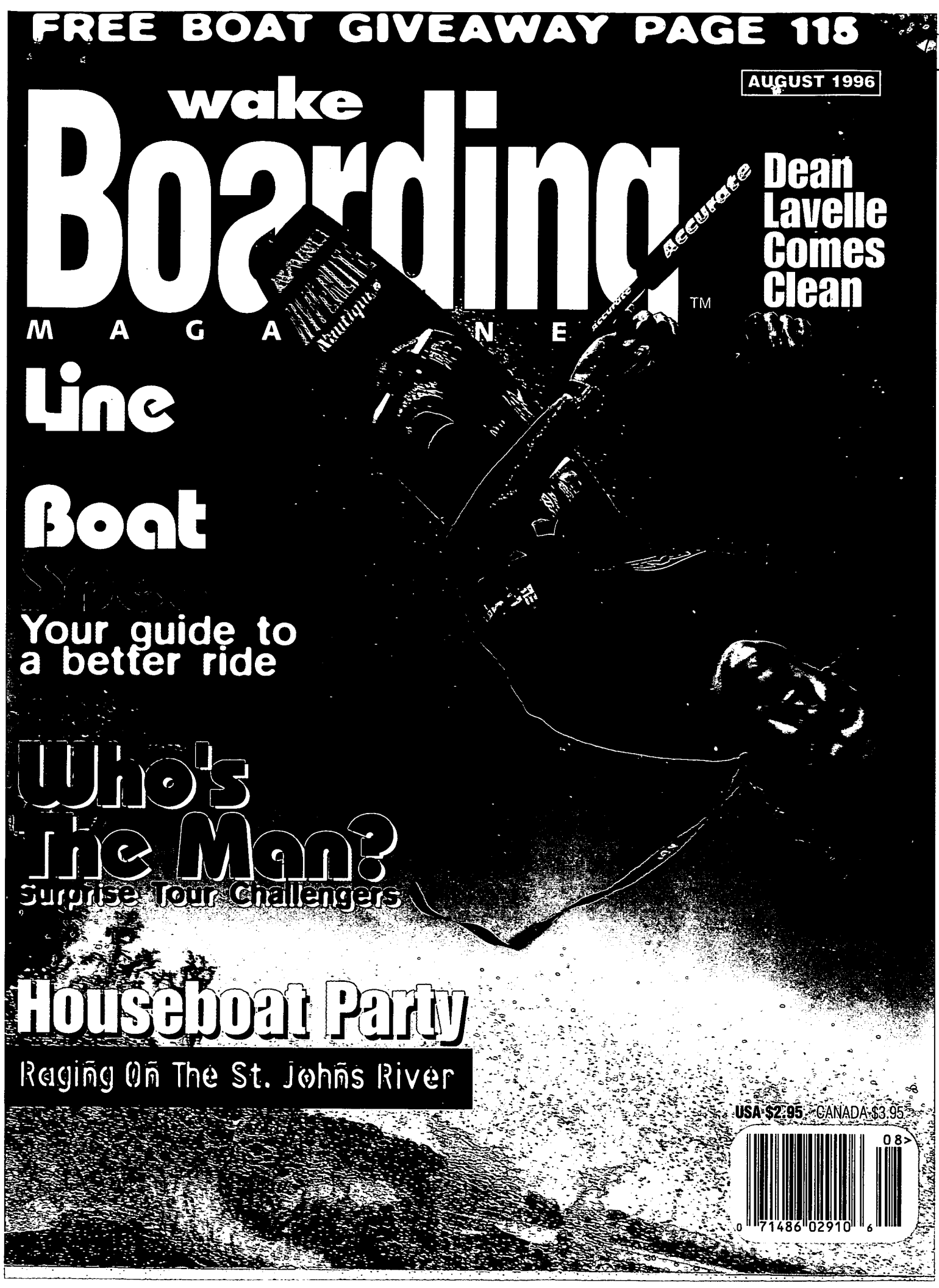

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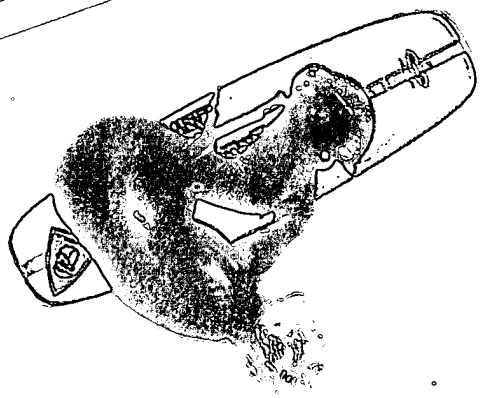

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Exhibit 5

DECLARATION OF TOM KING

I, Tom King, having an address of 7401 Chancery Lane, Orlando, Florida 32809, declare the truth of the following statements:

1. I am a professional freelance photographer. Since 1977, I have photographed numerous water sports events, including water skiing, kneeboarding, wakeboarding, and the like.

2. The attached photograph depicts a boat that I have used in connection with photo shoots for more than ten years. An aluminum tower is mounted to the gunwales of the boat at a position amidships. The tower provides an elevated platform on which I can stand during photo shoots.

3. In the fall of 1991, during a lunch break of a photo shoot for the *WaterSki* magazine boat test held at the facilities of the Orange County Sportmen's Association on Lake Sheen in Orlando, Florida, Dave Reinhart, a well-known water sports performer, asked if I would tow him from behind my boat. Specifically, he wanted to attach the tow line to the tower at a point approximately six feet above the floor of the boat, thinking that it might give him the upward pull needed to execute a difficult wakeboard maneuver known as the "Air Raley." I was glad to help out. Several employees of *WaterSki* magazine and other performers went along for the ride and "coached" Dave, giving him a thumbs up or a thumbs down for his efforts. Approximately 20 other people watched from the dock. We did this for several days, and before long Dave had mastered the "Air Raley" maneuver.

4. In all, upwards of 20 people witnessed the foregoing events. None of those people was under any obligation to keep what he or she had seen secret. Since the events

described took place on a public lake in public view, others unknown to me also may have witnessed those events.

5. In the fall of 1992, I again used my boat in the above-described manner to tow Dave Reinhart — this time, in connection with a photo shoot for a Connelly Skis' catalog. This photo shoot took place on another public lake — Lake Tibet-Butler, also in Orlando — and at least four people were present during the shoot. None of those people was under any obligation to keep what he or she had seen secret.

6. The attached photograph shows my boat, with tow rope attached, as it existed at the time of the 1991 and 1992 events described above.

7. I hereby affirm that all statements made on the basis of my own knowledge are true and that all statements made on information and belief are believed to be true. I understand that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001.

EXECUTED ON THIS 25th DAY OF OCTOBER, 2000.

Tom King

Tom King

MERCURY
FL9976CP

(6)

David Reinhart
1235 N.W. 19 Terrace
Delray Beach, FL 33445

John Dorton
Master Craft Boat Company
100 Cherokee Cove Drive
Vonore, TN 37885

Hello John,

Skip asked if I write write you a letter detailing my experience with a extended pylon.

In 1991 while working for waterski magazine as a tester for the boat buyers guide I had the opportunity to ski or ride behind a boat with a tower. Tom King is a waterski photographer and has a 21 foot boat with a tower used for photographing skiers . The tower is elevated as Tom can get photos from a better angle. During one of my lunch breaks I asked Tom King if he would pull me behind his 21 feet photo boat. I figured that if I tied the rope higher it would enable me to get higher in the air and also help me in mastering a new trick. Beside the tower it had a much bigger wake compared to the standard tournament ski boat of its time. I was eager to learn the air Raley. The results were great and afterward we organized photo shoots using his boat for that purpose.

Thanks,

David Reinhart

OEM COPY

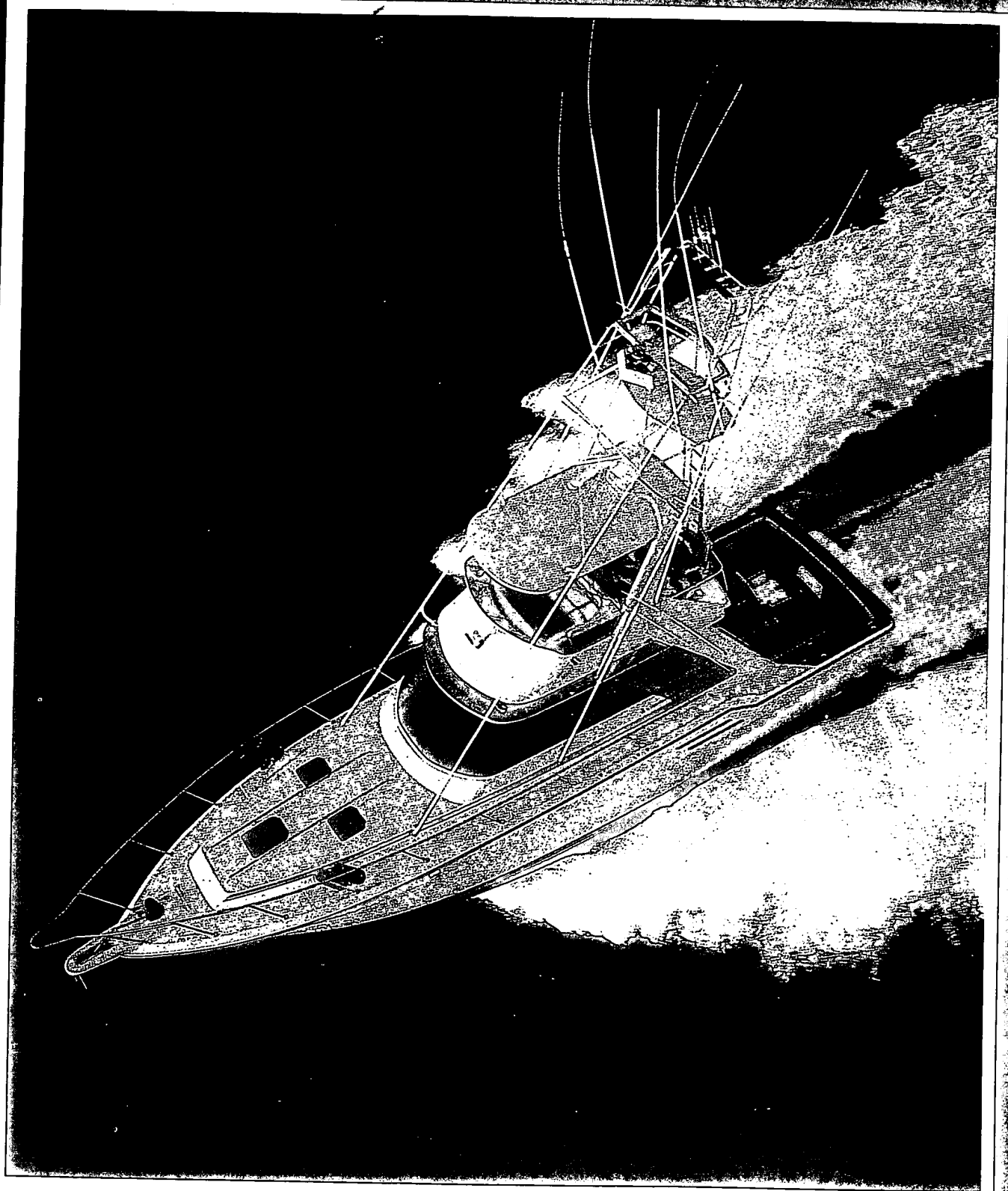
87/88 MARINE CATALOG

TACO

SUPPLY

Division of TACO METALS, INC.

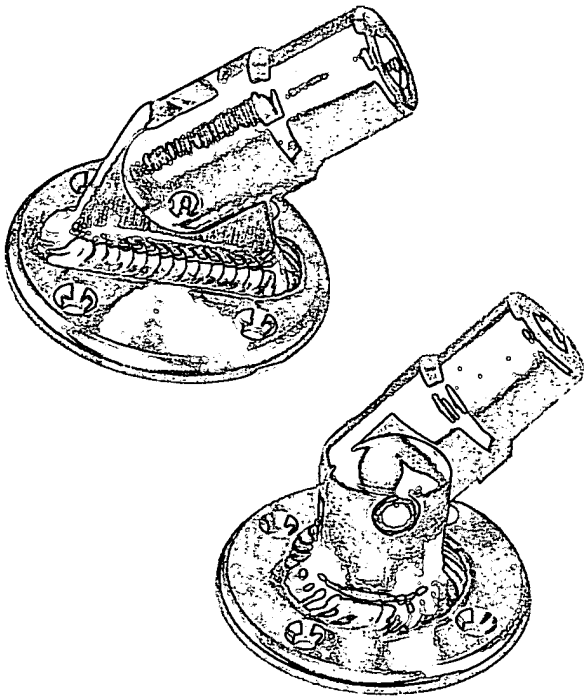
MARINE TOWER EXTRUSIONS & HARDWARE



CUSTOM MARINE TOWER FITTINGS

Used in the Construction of Towers, Tee Tops, Rocket Launchers, Bow Rails, Hard Top Supports, and Other Marine Structures.

High Quality Precision Fittings Made from 6061-T6 Solid Aluminum Stock for Strength, and Anodized for Long Lasting Durability.



CTF1 ROUND BASE MOUNTING PAD WITH FEMALE PIN

CTF1S ROUND BASE MOUNTING PAD WITH MALE PIN

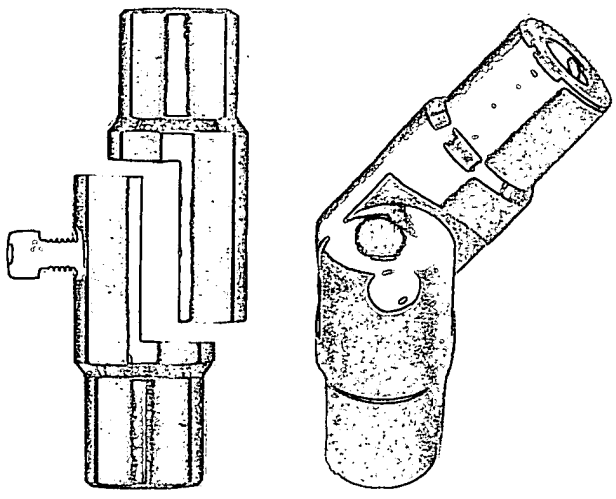
CTF1-2(S) Fits 3/4" SCHEDULE 40 PIPE (WBRC-2)
4 Hole 3" Diameter Pad Countersunk for #10 Fasteners, with Radius Edge.
Pin Hinged with 1/4" 18-8 s/s Socket Cap Bolt.

CTF1-3(S) Fits 1" SCHEDULE 40 PIPE (WBRC-3)
4 Hole 3 1/2" Diameter Pad Countersunk for #10 Fasteners, with Radius Edge.
Pin Hinged with 5/16" 18-8 s/s Socket Cap Bolt.

CTF1-4(S) Fits 1 1/4" SCHEDULE 40 PIPE (WBRC-4)
4 Hole 4" Diameter Pad Countersunk for 1/4" Fasteners, with Radius Edge.
Pin Hinged with 3/8" 18-8 s/s Socket Cap Bolt.

CTF1-5(S) Fits 1 1/2" SCHEDULE 40 PIPE (WBRC-5)
4 Hole 4" Diameter Pad Countersunk for 1/4" Fasteners, with Radius Edge.
Pin Hinged with 3/8" 18-8 s/s Socket Cap Bolt.

All Pins Designed to Hinge 180° +



CTF2 BREAK-AWAY PIN

CTF2-2 Fits 3/4" SCHEDULE 40 PIPE (WBRC-2)
Held Together with 1/4" s/s Socket Cap Bolt.

CTF2-3 Fits 1" SCHEDULE 40 PIPE (WBRC-3)
Held Together with 5/16" s/s Socket Cap Bolt.

CTF2-4 Fits 1 1/4" SCHEDULE 40 PIPE (WBRC-4)
Held Together with 3/8" s/s Socket Cap Bolt (2 Bolt).

CTF2-5 Fits 1 1/2" SCHEDULE 40 PIPE (WBRC-5)
Held Together with 3/8" s/s Socket Cap Bolt (2 Bolt).

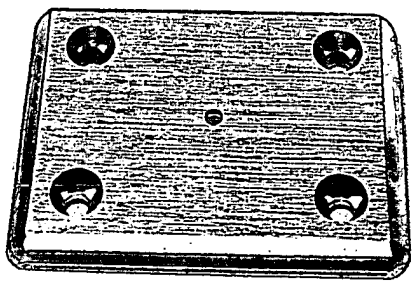
CTF5 ELBOW WITH MALE AND FEMALE PIN

CTF5-2 Fits 3/4" SCHEDULE 40 PIPE (WBRC-2)
Hinged with 1/4" s/s Socket Cap Bolt.

CTF5-3 Fits 1" SCHEDULE 40 PIPE (WBRC-3)
Hinged with 5/16" s/s Socket Cap Bolt.

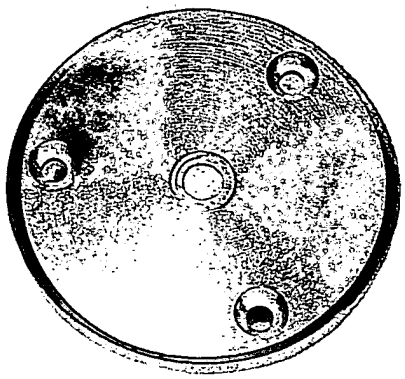
CTF5-4 Fits 1 1/4" SCHEDULE 40 PIPE (WBRC-4)
Hinged with 3/8" s/s Socket Cap Bolt.

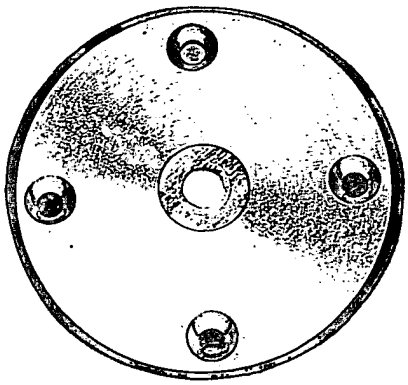
CTF5-5 Fits 1 1/2" SCHEDULE 40 PIPE (WBRC-5)
Hinged with 3/8" s/s Socket Cap Bolt.



CTF3 3"x4" RECTANGULAR MOUNTING PADS

1/4" Thick — 4 Holes Countersunk for #10 Fasteners.





CTF4 ROUND MOUNTING PAD

1/4". Thick

CTF4-325 2 1/2" Diameter 3 Holes Countersunk for #10 Fasteners, with Radius Edge.

CTF4-33 3" Diameter 3 Holes Countersunk for #10 Fasteners, with Radius Edge.

CTF4-335 3 1/2" Diameter 3 Holes Countersunk for #10 Fasteners, with Radius Edge.

CTF4-435 3 1/2" Diameter 4 Holes Countersunk for #10 Fasteners, with Radius Edge.

CTF4-34 4" Diameter 3 Holes Countersunk for 1/4" Fasteners, with Radius Edge.

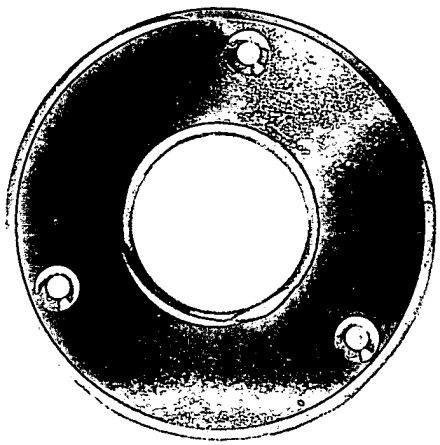
CTF4-44 4" Diameter 4 Holes Countersunk for 1/4" Fasteners, with Radius Edge.

CTF4-345 4 1/2" Diameter 3 Holes Countersunk for 1/4" Fasteners, with Radius Edge.

CTF4-35 5" Diameter 3 Holes Countersunk for 1/4" Fasteners, with Radius Edge.

CTF4-445 4 1/2" Diameter 4 Holes Countersunk for 1/4" Fasteners, with Radius Edge.

CTF4-45 5" Diameter 4 Holes Countersunk for 1/4" Fasteners, with Radius Edge.



CTF9 TOWER FOOT

1/4" Thick
5" Diameter

3 Holes Countersunk for 1/4" Fasteners, with radius edge. Center is 2" in Diameter.

US005697320A

United States Patent [19]

Murray

[11] Patent Number: 5,697,320

[45] Date of Patent: Dec. 16, 1997

(11)

[54] **CONVERTIBLE TOP/UMBRELLA**

[76] Inventor: **Robert W. Murray**, 806 Park Pl., West Palm Beach, Fla. 33401

[21] Appl. No.: **618,633**

[22] Filed: **Mar. 19, 1996**

[51] **Int. Cl.**[6] **B63B 17/00**

[52] **U.S. Cl.** **114/361**; 296/216

[58] **Field of Search** 114/270, 361, 114/364; 296/216

[56] **References Cited**

U.S. PATENT DOCUMENTS

2,833,296	5/1958	Wooddruff, Sr.	114/361
5,303,667	4/1994	Zirkelbach et al.	114/361
5,361,717	11/1994	Kobayashi	114/361

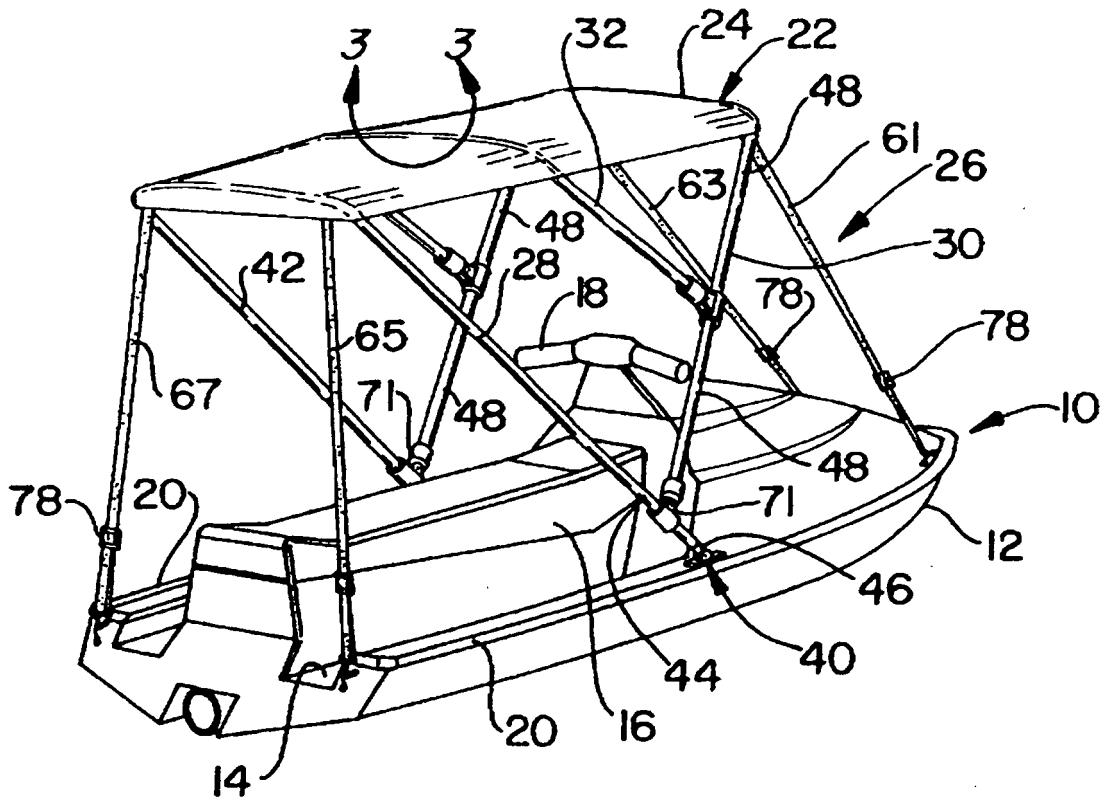
Primary Examiner—Jesus D. Sotelo

Attorney, Agent, or Firm—Norman Friedland

[57] **ABSTRACT**

A convertible top canopy is pivotally attached to the hull of a multiple seat cruiser jet boat by a simple linkage system consisting of three U-shaped links each of which are attached at the base of the "U" to the canopy, the main link is pivotally and removably attached to the hull and another link is pivotally attached to the main link and the third link is pivotally attached to the second link and pivots to fold and lie against the deck on the stern of the watercraft. Tension straps at the stern and bow attach to the hull and forward and aft U-shaped links to position the canopy relative to the hull in the up position. The canopy is removable from the watercraft by releasing the main link and straps and usable as a cabana or umbrella on the ground by inserting a portion of the main link into the ground and tensioning the forward straps to stakes mounted in the ground.

13 Claims, 3 Drawing Sheets



PART ONE OF OUR LONG-TERM TEST

12

SEPTEMBER 1995

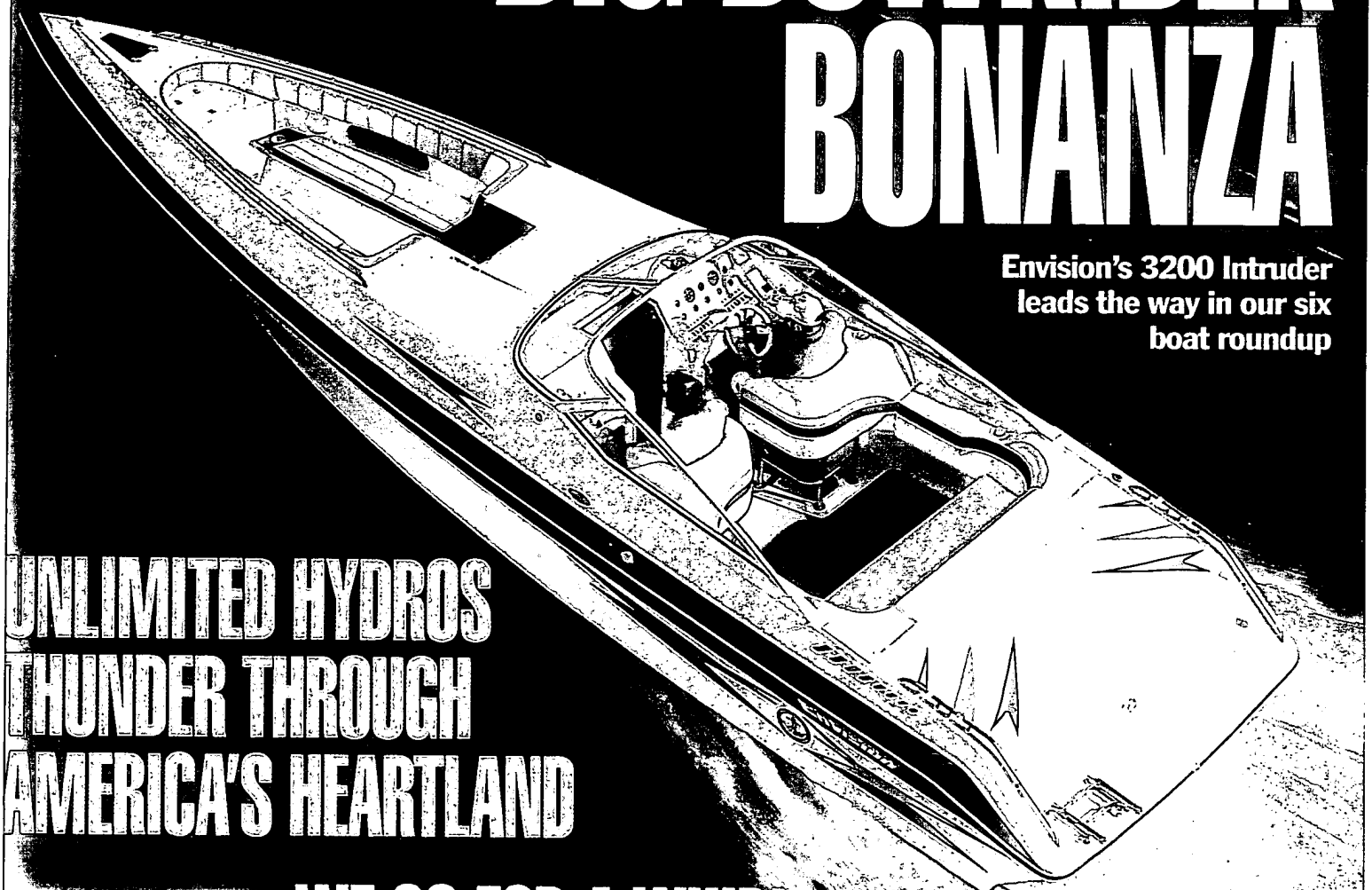
POWERBOAT

ISSN0032-6089

THE WORLD'S LEADING PERFORMANCE BOATING MAGAZINE

BIG BOWRIDER BONANZA

Envision's 3200 Intruder leads the way in our six boat roundup



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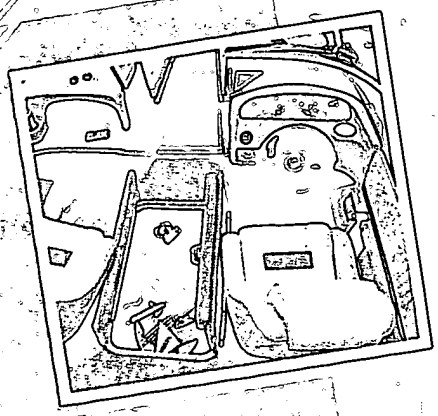

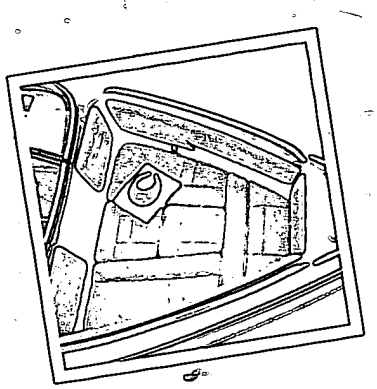

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Wherever it runs the new Celebrity 190 Bow Rider attracts attention. The sleek lines, hot graphics and smooth running performance will get you noticed. But a closer look reveals more Celebrity advantages. Like a super wide 8 foot beam for a smoother ride and more interior room, a huge bow section and loads of storage including ski storage large enough to accomodate the ever popular knee board. All at a price so attractive it'll turn *your* head. Stand out from the crowd with a new Celebrity 190 Bow Rider. See your Celebrity dealer soon.

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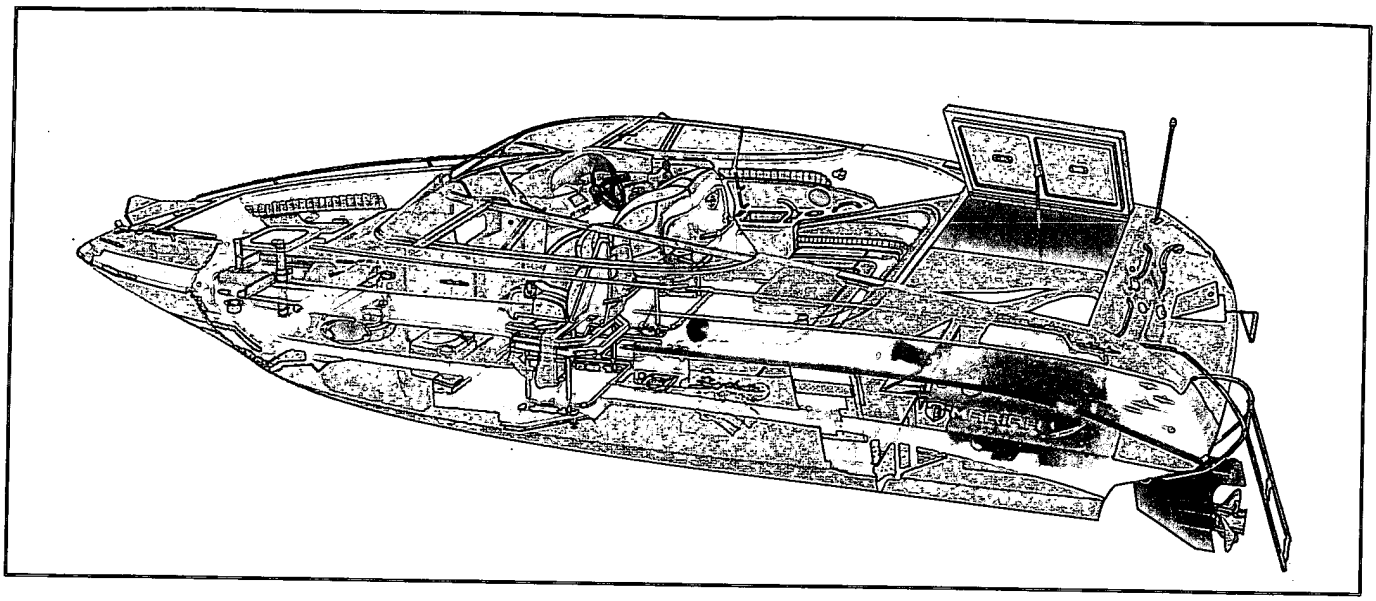
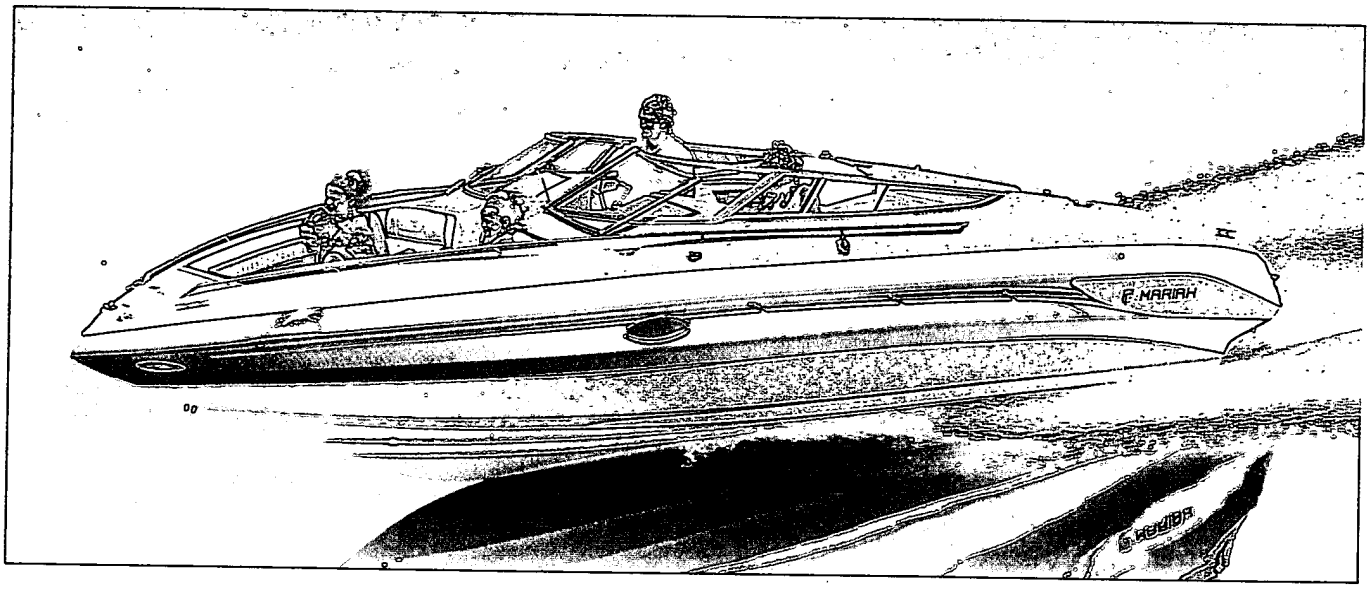
The Contents...



The Container.



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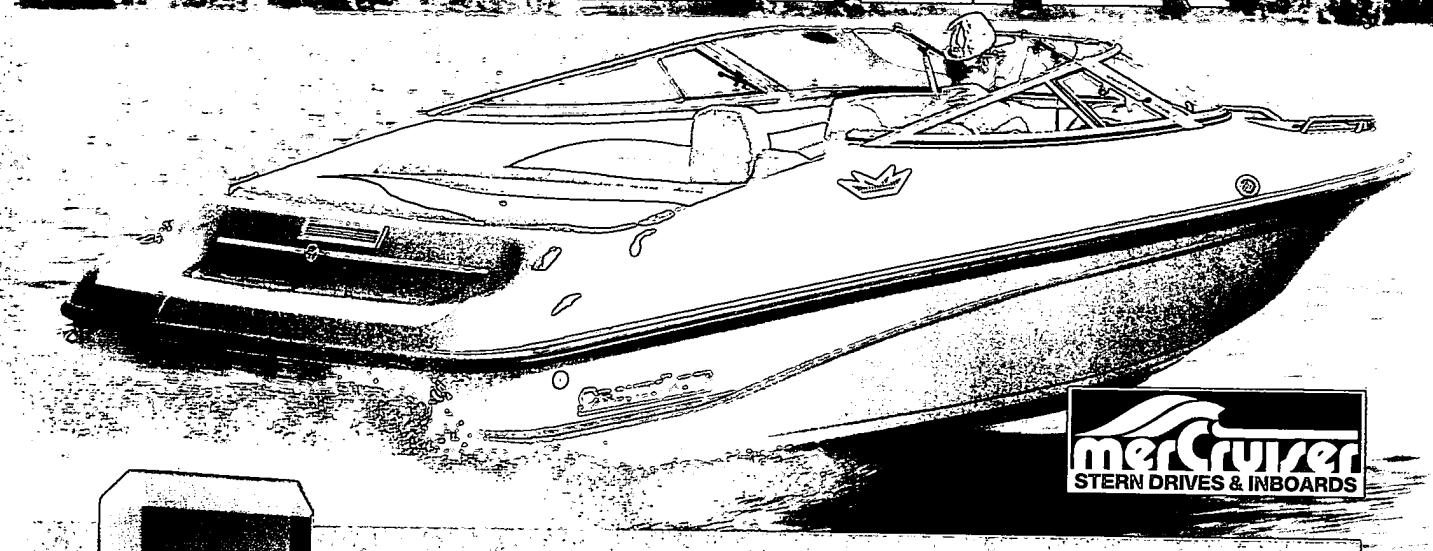

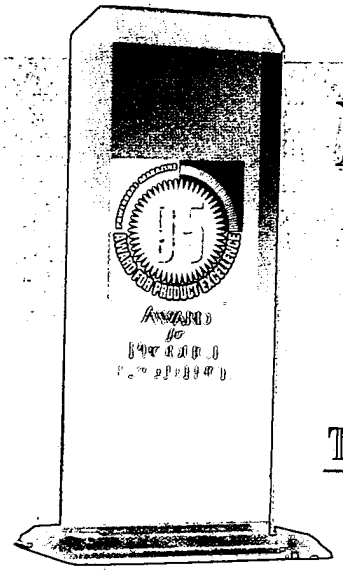

Powerboat Magazine selects CrownLine's 202 BR as "Compact Boat of the Year for 1995."

THE BEST OF THE BEST FOR '95 GETS BETTER FOR '96

CrownLine's 202 BR didn't become "Boat of the Year" by accident. Aggressive styling, value packed features, great performance and superior quality placed this innovative craft at the top; the best of the best.

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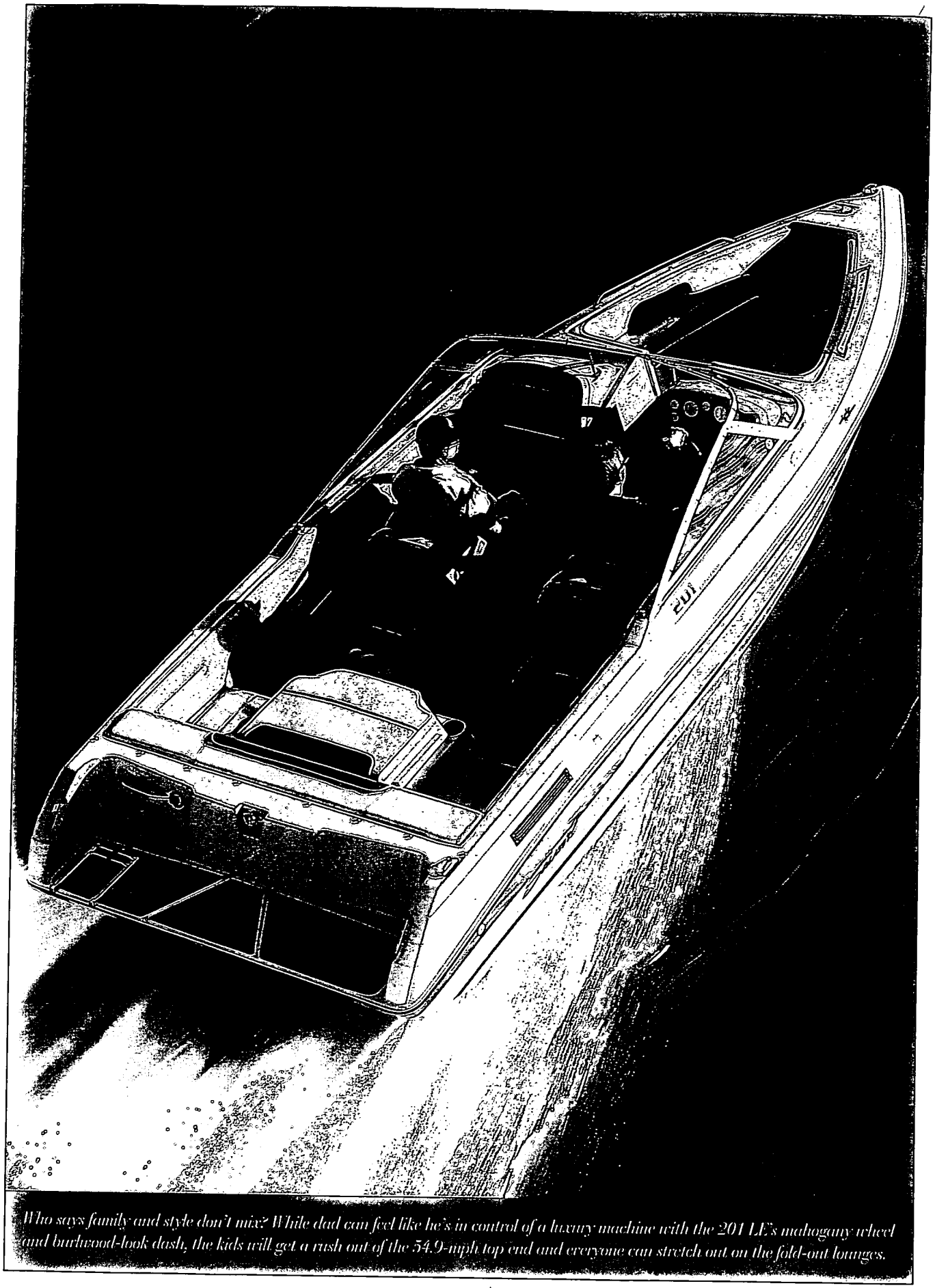


Who says family and style don't mix? While dad can feel like he's in control of a luxury machine with the 201 LE's mahogany wheel and burlwood-look dash, the kids will get a rush out of the 54.9-mph top end and everyone can stretch out on the fold-out lounges.

Exhibit 8

DECLARATION OF RON SCHMITT

I, Ron Schmitt, having an address of 7230 15th Street East, Sarasota, Florida 34243, declare the truth of the following statements:

1. I am the President of G.G. Schmitt & Sons Inc., a manufacturer of marine hardware for pleasure boats, including ski boats. Since 1951, G.G. Schmitt & Sons Inc. has manufactured and sold thousands of boat-mounted aluminum structures, including photo towers, observation towers, arches, and T-tops.

2. I have a Bachelor of Science degree in Industrial Management. I have designed marine hardware for G.G. Schmitt & Sons Inc. since 1971.

3. Having worked as a designer in the marine hardware industry for almost 30 years, I am knowledgeable about the level of ordinary skill in that industry for the years 1995 through 1998.

4. I have read U.S. Patent No. 5,979,350 ("the '350 patent"), issued to Correct Craft, Inc. and entitled "Water Sport Towing Apparatus And Method," and have an understanding of the subject matter covered by the claims of that patent. I have been informed that the filing date of the application for the '350 patent was March 9, 1998, and that the '350 patent is the subject of a pending reisssue proceeding.

5. I am familiar with Correct Craft, Inc., which has purchased accessories other than wakeboard towers from G.G. Schmitt & Sons Inc. in the past. I have never been contacted by Correct Craft, Inc. in regard to the '350 patent. The first time I saw the '350 patent was in connection with the preparation of this Declaration.

6. G.G. Schmitt & Sons Inc. does not currently make or sell towers

specifically intended for towing a water sports performer, nor has it done so in the past. But in the interest of full disclosure, G.G. Schmitt & Sons Inc. is contemplating, at the request of some of its customers, the possibility of making wakeboard towers.

7. I am familiar with an article in a September 1995 issue of *Powerboat* magazine (pages 4 and 92), describing and illustrating the use of a tower-equipped boat to tow a trick skier sitting on an "Air Chair" ("the *Powerboat* article").

8. I find that the *Powerboat* article discloses all of the features recited in claims 12, 15, 16, 18, 19, 22, 24-27, 29, 30, 33, 35, 36, 38, and 39 of the '350 patent.

9. In my opinion, during the time period from September 1995 to March 1998, an ordinarily-skilled marine hardware designer could have built a tower for towing a water sports performer and mounted such tower amidships on a boat, as recited in claims 12, 15, 16, 18, 19, 22, 24-27, 29, 30, 33, 35, 36, 38, and 39 of the '350 patent, based solely on the disclosure of the *Powerboat* article in combination with his or her own knowledge and skill, and without reference to the teachings of the '350 patent. Given the clear teaching of the *Powerboat* article to mount a tower amidships for the purpose of towing a water sports performer, the design, manufacture, and installation of such a tower would have been routine mechanical tasks, easily within the level of ordinary skill in the marine hardware industry during that time period.

10. In my opinion, an ordinarily-skilled marine hardware designer would have recognized that the tower could be attached either to the raised gunwales of the boat, as appears to be shown in the *Powerboat* article, or to the floor of the boat, depending on the configuration of the boat. Provided the gunwales of the boat were of sufficient structural integrity to withstand the load resulting from attaching the tower thereto, the ordinarily-skilled marine hardware designer would have, in my opinion, preferred to attach the tower to the gunwales. In that way,

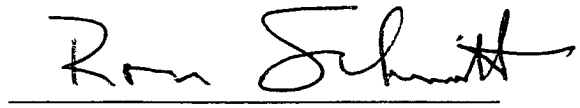
the interior of the boat would remain relatively unobstructed, thus facilitating the free movement of the driver and passengers around the boat..

11. Throughout the time period from September 1995 to March 1998, it was widely recognized in the marine hardware industry that boats frequently need to pass underneath bridges or into boat houses. Accordingly, boat-mounted structures that protruded substantially above the boat often were hinged at their base, using commercially-available hinged tower fittings such as shown, for example, on page 34 of a 1987 Taco Supply Marine Catalog. In that way, the structures could be rotated downward whenever it was necessary for the boat to pass under a low clearance.

12. Prior to March 9, 1997, G.G. Schmitt & Sons Inc. had designed and sold many photo towers, observation towers, and T-tops that were made to hinge at their base for passage underneath low clearances and storage purposes. These structures were mounted amidships on a boat at a location above the operator station.

13. I hereby affirm that all statements made on the basis of my own knowledge are true and that all statements made on information and belief are believed to be true. I understand that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001.

EXECUTED ON THIS 26 DAY OF OCTOBER, 2000.



Ron Schmitt